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No. 04-165

IN THE

Supreme Court of the United States

COMSTOCK RESOURCES, INC., *et al.*,
Petitioners,

v.

DON C. KENNARD AND HARROLD E. WRIGHT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act, 31 U.S.C. § 3729, *et seq.* authorizes private "*qui tam*" actions by a relator on behalf of the United States to recover for fraud against the United States. The Act provides, however, that "[n]o court shall have jurisdiction" over a *qui tam* action that is "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing," unless the person bringing the action is an "original source of the information." 31 U.S.C. § 3730(e)(4). An "original source" is defined, in turn, as an "individual who has direct and independent knowledge of the information on which the allegations are based." The Questioned Presented is as follows:

Whether, under the False Claims Act, individuals who possess no personal, firsthand knowledge of any aspect of an alleged fraud have the requisite "direct and independent knowledge" to qualify as an "original source" under 31 U.S.C. § 3730(e)(4).

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Tenth Circuit.

The appellees below were Comstock Resources, Inc.; Comstock Oil & Gas, Inc. (for itself and as successor by merger with Black Stone Oil Co.); Willow Creek Resources, Inc.; and W.T. Carter & Brother Co. Appellants below were Don C. Kennard and Harrold E. Wright, acting as relators on behalf of the United States.

Pursuant to Rule 29.6, Petitioners state that Comstock Resources, Inc. is the parent company of Comstock Oil & Gas, Inc. Comstock Resources, Inc. has no parent company. No publicly traded company owns 10% or more of the publicly traded stock in Comstock Resources, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Comstock Resources, Inc. and Comstock Oil & Gas, Inc. (for itself and as successor by merger with Black Stone Oil Co.) (collectively "Comstock") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 363 F.3d 1039, and is reprinted in the Appendix at Pet. App. 1a-17a. The denial of the petition for rehearing and rehearing en banc is reprinted in the Appendix at Pet. App. 34a-35a. The district court's opinion is reprinted in the Appendix at Pet. App. 18a-33a.

JURISDICTION

The court of appeals entered judgment on April 5, 2004. Comstock filed a timely petition for rehearing and rehearing en banc on April 16, 2004. The court of appeals denied the petitions on May 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA"). The pertinent provisions of the FCA are reproduced in the Appendix at Pet. App. 36a.

STATEMENT OF THE CASE

This Petition arises out of a *qui tam* action filed by relators Don C. Kennard and Harrold E. Wright alleging that Comstock fraudulently underpaid royalties due on oil and gas leases to an Indian Tribe. That suit was filed *after* the allegations of fraud had been disclosed publicly in a separate action against Comstock brought by the Tribe itself. Once a

fraud has been publicly disclosed in that manner, the FCA generally precludes any subsequent private action unless the would-be relators can show, among other things, that they had "direct" knowledge of the fraud.

In the decision below, the Tenth Circuit held that Kennard and Wright had the requisite "direct" knowledge even though they neither witnessed nor participated in any aspect of the allegedly fraudulent transactions, and even though they were interlopers who had no affiliation with either Comstock or the Tribe. Indeed, Kennard and Wright had gathered what little information they had only from an examination of federal government reports and other public documents. By allowing Wright and Kennard to proceed with their FCA suit, the Tenth Circuit created a direct conflict among the courts of appeals and misinterpreted the FCA to permit suits that Congress intended to foreclose. This Court should grant review to clear up the confusion and restore the balance that Congress struck in the FCA.

A. Statutory Framework

The FCA imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). Violators are liable to the United States for a "civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." *Id.* § 3729(a).

To promote enforcement, Congress enacted "*qui tam*" provisions that permit a private individual, known as a relator, to "bring a civil action for a violation of [31 U.S.C. § 3729] for the person and for the United States Government

. . . in the name of the Government." *Id.* § 3730(b)(1). The relator receives a share of any government recovery. *Id.* § 3730(d). The relator's *qui tam* complaint is filed under seal and served on the government with a "written disclosure of substantially all material evidence and information" in the relator's possession. *Id.* § 3730(b)(2). The government may then either choose to intervene and take over the litigation or decline to intervene. If the government declines to intervene, "the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(2), (4).

As originally enacted during the Civil War era, the *qui tam* provisions authorized any private party to sue in the government's name based on the individual's knowledge of fraud against the government. Act of March 2, 1863, ch. 67, § 4, 12 Stat. 696, 698. Although the provisions were seldom used during the first decades of the FCA's existence, they were invoked with increasing frequency during the 1930s and 1940s, "when increased government spending opened up numerous opportunities" for fraud by those providing goods and services to the government. *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679 (D.C. Cir. 1997). Because the original FCA lacked effective restrictions on private enforcement, private litigants "often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations." *Id.* at 679-80. After this Court held that the FCA authorized such suits, *see United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), Congress amended the FCA to bar private actions that were "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." Act of December 23, 1943, § 3491(c), 57 Stat. 608, 609. That amendment reduced the abuses that prompted its enactment, but it also had the consequence of restricting *qui tam* suits by private individuals who brought

fraud to the government's attention. *See, e.g.*, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

In 1986, Congress amended the Act again in an effort to "resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits."[1] To achieve the desired balance, Congress enacted a number of jurisdictional restrictions that foreclose *qui tam* suits in certain circumstances. *See* 31 U.S.C. § 3730(e). In § 3730(e)(4), Congress limited a relator's ability to bring a *qui tam* action once the fraud has already been made public, for example in a court filing or a newspaper article. Section 3730(e)(4) provides that "[n]o court shall have jurisdiction" over an FCA *qui tam* action that is "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing . . . or from the news media," unless the person bringing the action is an "original source of the information." 31 U.S.C. § 3730(e)(4)(A). An "original source" is defined, in turn, as an "individual who has direct and independent knowledge of the information on which the allegations are based." *Id.* § 3730(e)(4)(B). This Petition concerns the meaning of the term "direct and independent knowledge" in the definition of "original source."

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[1] *False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (statement of co-sponsor Sen. Grassley).

B. Factual Background

Comstock owns substantial interests in nine oil and gas leases (the "Indian Leases") covering lands within the reservation of the federally recognized Alabama and Coushatta Indian Tribes of Texas (the "Tribe"). As required by applicable federal regulations, *see, e.g.*, 30 C.F.R. § 218.51, Comstock paid the royalties it owed to the Tribe on the Indian Leases directly to the United States Minerals Management Service ("MMS"), a branch of the United States Department of the Interior, which in turn forwarded the royalties to the Tribe.[2] At the time this case was filed, Comstock was paying more than $1,000,000 in royalties each month to the Tribe.

Relator Kennard is a former state senator who served as a member of the Oil and Gas Committee of the Texas Senate and taught at the LBJ School of Public Affairs in Austin. Relator Wright owned royalty interests in a tract of land in eastern Texas near, but outside of, the Tribe's reservation. Neither Kennard nor Wright is a member of or has any connection to the Tribe, and neither one worked at or had any substantial connection to Comstock, or to the MMS or any other branch of the Interior Department.

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[2] MMS is responsible for (a) collecting royalties on behalf of the Tribe; (b) performing audits of royalty payments on behalf of the Tribe; and (c) remitting the royalty payments to the Tribe. 30 C.F.R. Parts 206 (subparts B & E), 210, 215, 216, 217, & 241. MMS is required to transfer the payments it receives from lessees such as Comstock into the trust accounts held on behalf of the Tribe entitled to receive royalties. *See* 30 C.F.R. § 219.103.

1. *The Investigation.*

In late 1997, Kennard began to suspect that Comstock was underpaying certain royalties it owed to the Tribes. His initial suspicions were based not on any firsthand knowledge or observations, but instead on a public federal government document that Kennard came across while working for Wright in connection with another FCA *qui tam* suit. In particular, a 1996 Mineral Revenue Report issued by the MMS showed that no royalties on natural gas liquids ("NGLs") were being paid with respect to production on Indian lands in Texas. Believing that the absence of any NGL royalties was "suspicious," Kennard went to the offices of the Railroad Commission of Texas and examined files on wells located on the Tribe's reservation. The files indicated that Comstock operated a number of wells on the reservation. The information in the files suggested to Kennard that gas from these wells was "wet" gas, which (in his view) made the absence of NGL royalties even more suspicious. Pet. App. 37a-40a.

Kennard then reviewed publicly available files in the Texas General Lands Office ("GLO") and noticed that the word "expired" had been stamped on the file jackets of several of the Indian Leases. This reinforced Kennard's speculation that Comstock was underpaying the Tribe, because Kennard believed that, once the Indian Leases had expired, the Tribe was entitled to *all* resources extracted from the reservation rather than just to the royalties specified in the Indian Leases. Pet. App. 40a-45a. Kennard had no personal knowledge of whether those Indian Leases in fact had expired.

Kennard shared his suspicions with Wright. Wright reviewed his own private payment records and allegedly noticed that when the operator on Wright's property sold its

lease interests to Comstock, Wright's own royalty payments dropped. Pet. App. 45a. Wright "speculated" that Comstock was also underpaying "others in the area, including the Tribe." Pet. App. 2a.

2. *The Public Disclosure.*

Kennard and Wright, through their attorneys, presented the results of their investigation to the Tribe and its lawyers and invited the Tribe to join them in a *qui tam* action as co-relators. The Tribe declined the invitation.

On October, 21, 1998, Kennard and Wright sent to the United States the disclosure statement required by the FCA, 31 U.S.C. §§ 3730(b)(2), (4), along with their proposed complaint. On October 26, 1998, the Tribe filed its own lawsuit against Comstock in the United States District Court for the Eastern District of Texas alleging that Comstock had underpaid royalties to the Tribe.[3]

C. Proceedings Below

On October 27, 1998, one day after the Tribe filed its lawsuit publicly disclosing the fraud allegations against Comstock, Kennard and Wright filed their FCA *qui tam* complaint in the same court. As required by the FCA, the complaint was filed under seal to allow the United States to review the disclosure materials and decide whether to intervene and take over the litigation. After reviewing those materials, the United States declined to intervene.

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[3] That lawsuit has spawned years of litigation between Comstock and the Tribe in multiple arenas. *See, e.g., Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes*, 78 F. Supp. 2d 589, 591 (E.D. Tex. 1999), *aff'd in part, rev'd in part*, 261 F.3d 567, 569-70 (5th Cir. 2001) (describing litigation). The issues raised in that litigation are not currently before the Court.

On December 3, 1999, relators' complaint was unsealed, and, eleven months later, their case was transferred by the Judicial Panel on Multidistrict Litigation ("MDL") to the United States District Court for the District of Wyoming, where it was consolidated with other FCA litigation pending against hundreds of natural gas producers and pipeline companies involved in gas production pursuant to federal and Indian leases.

After reviewing relators' complaint, the MDL court expressed concern about the lack of concrete allegations of fraud. The court characterized the complaint as "skimpy at best," and it suggested that relators were "throwing a lot of mud on the wall ... [and] hoping some of it sticks." Supplemental Appendix to Brief of Appellees Comstock Resources, Inc. *et al.*, at 649-50 (10th Cir. filed Apr. 18, 2003). The district court then directed relators to file an amended complaint with more specific allegations.

Comstock moved to dismiss on the ground that the court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). Comstock argued that relators' complaint was "based upon a public disclosure" – *i.e.*, the Tribe's complaint that had been filed the day before relators' own initial complaint was filed – and that relators were not the "original source" of the information.

The district court granted Comstock's motion to dismiss. The court agreed that relators allegations were "substantially similar" to the allegations publicly disclosed in the Tribe's complaint, and that relators' action thus triggered the FCA's public disclosure jurisdictional bar. Pet. App. 24a-26a.

The district court then turned to the "original source" exception to that bar. Relying on relators' own affidavits describing their investigation, the district court noted that

relators "never had any intimate knowledge of the inner-working of Comstock or the related Defendants," and instead "merely provided this Court a compilation of information that is a matter of public record." Pet. App. 30a-31a. The court noted that the "Indian lease files found at the GLO are publicly accessible," and that "the MMS reports filed by Comstock are also matters of public record." *Id.* at 31a. The district court further noted that relators' own affidavits made clear that "all the information regarding the underlying fraud was derived from the works of others," and relators had "merely compiled public information and because of their education and background were able to speculate that Comstock had underpaid NGL royalties." *Id.* The district court observed that "other circuits have uniformly held that a relator cannot possess 'direct' knowledge when the information is gathered from public sources." *Id.* at 32a; *see also id.* at 32a n.4 (citing cases). Accordingly, the court held that neither relator was an "original source."

The Tenth Circuit reversed, concluding that relators were the "original source" of the information. The court acknowledged that Wright and Kennard "did not possess substantive information about the particular fraud"; that relators were not "insiders of Comstock or the Tribe"; and that relators had "relied on public records" to assemble their complaint. Pet. App. 9a. Moreover, it was undisputed that relators had no personal knowledge of Comstock's royalty payment practices under the Indian Leases, and that relators' allegations were thus based not on observation, but on "speculat[ion]." *Id.* at 2a (noting that Wright "speculated" Comstock was underpaying "others in the area, including the Tribe"). In the Tenth Circuit's view, however, this acknowledged lack of personal knowledge was not dispositive because relators had acquired the requisite "direct" knowledge through investigation of public sources.

In particular, adopting what might be called a "sweat of the brow" approach, the Tenth Circuit emphasized that "[i]t is the character of the relator's discovery and investigation that controls this inquiry." Pet. App. 10a. The court thus eschewed any "bright line" rule for determining when a relator possesses direct knowledge, and instead adopted what amounts to a totality-of-the-circumstances approach that permits a case to proceed whenever the presiding judge believes a private individual's diligence and ingenuity should be rewarded, regardless of whether the relator witnessed or participated in the fraud.

Applying that approach, the Tenth Circuit concluded that Kennard and Wright qualified as "original sources." The court relied on the fact that "none of the public documents disclosed the alleged fraud," and that "it was only through independent investigation, deduction, and effort" that relators were able to surmise that a fraud may have occurred. Pet. App. 13a-14a. In short, "[t]hrough discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source." *Id.* at 14a.[4]

REASONS FOR GRANTING THE PETITION

This case warrants review because it presents an important and frequently recurring issue under the *qui tam* provisions of the FCA as to which the circuits are in conflict.

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[4] The Tenth Circuit also rejected Comstock's argument that FCA does not authorize a relator to sue when, as here, the United States acts essentially as a pass-through for funds such that there is no actual or threatened loss to the U.S. Treasury. Pet. App. 16a-17a. Comstock is not challenging that aspect of the Tenth Circuit's decision in this Petition.

If left undisturbed, the Tenth Circuit's interpretation of the FCA's "original source" provision threatens a vast expansion of speculative private *qui tam* actions that will disrupt the careful balance Congress struck between encouraging disclosure of fraud and preventing wasteful and parasitic lawsuits.

In this case, the Tenth Circuit squarely held that the FCA does not require a *qui tam* relator to have personal knowledge of any element of the alleged fraud to possess the "direct" knowledge necessary to qualify as an "original source." Thus, even a relator who did not witness any aspect of the fraud, who had no connection whatsoever to the allegedly fraudulent activity, and who relied exclusively on public documents and speculation therefrom, may satisfy the direct knowledge requirement as long as the relator obtained his information as a result of "independent investigation, deduction, and effort." Pet. App. 14a.

That holding, although consistent with language in decisions from the Seventh Circuit and the Eleventh Circuit, conflicts with decisions of the D.C., Second, Eighth, and Ninth Circuits, all of which require a relator to possess personal, firsthand knowledge – *i.e.*, knowledge gained as a witness or participant – of at least one element of the alleged fraud. *See, e.g.*, *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("A relator is said to have direct knowledge of fraud when he 'saw [it] with his own eyes'") (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992)) (alteration in original); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("In order to be 'direct,' the information must be first-hand knowledge."); *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525 (9th Cir. 1999) (holding that "direct" knowledge

requires the relator to "show that he had firsthand knowledge of the alleged fraud"); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) ("*Kreindler*"). These circuits require that a putative *qui tam* plaintiff actually witness or participate in activity that constitutes at least one essential element of the alleged fraud.

In departing from the reading of "direct and independent knowledge" adopted in these circuits, the Tenth Circuit has failed to give effect to the FCA's plain text. The D.C., Second, Eighth, and Ninth Circuits have all sensibly read the term "direct" in accordance with its plain meaning to require that knowledge be "firsthand," "immediate," or "unmediated." The Tenth Circuit, by contrast, permitted knowledge that is indisputably *indirect* and based solely on speculation and inference drawn from public sources to be sufficient as long as that knowledge was obtained through independent investigation and effort.

By gutting the "direct knowledge" limitation in this manner, the Tenth Circuit has disrupted the careful balance Congress struck in the 1986 Amendments to the FCA. The original source inquiry arises only when the relevant fraud has already been disclosed publicly, usually in a court proceeding or in the news media. In that context, Congress sensibly wanted to restrict the universe of plaintiffs who could bring suit, and it chose to do so by requiring that a plaintiff have not only "independent" but also "direct" – *i.e.*, personal and firsthand – knowledge of the fraud. *See* S. Rep. No. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 (noting that Congress sought to reward "individuals who are either close observers or otherwise involved in the fraudulent activity" for coming forward to break the "conspiracy of silence"). Congress did

not intend, however, to "create windfalls for people with secondhand knowledge of the wrongdoing." *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1045 (2004). Yet the Tenth Circuit interpretation of the original source provision does just that.

Immediate review of the Tenth Circuit's decision is a matter of pressing importance. The FCA is an actively litigated statute, with between 300 and 500 new *qui tam* actions filed each year. *See* Statistics Under the *Qui Tam* Provision of the False Claims Act Amendment of 1986 (Dep. of Justice, Sept. 30, 2002), *reprinted in* 2 John T. Boese, *Civil False Claims and Qui Tam Actions*, Appendix H (2d ed. 2003-2 Supp.) ("Boese Treatise"). The meaning of the "direct knowledge" limitation arises in a significant percentage of those cases, and, as a leading treatise has pointed out, the definition of who is an original source possessing direct knowledge of an alleged fraud "has become (along with 'public disclosure') the most litigated – and confused – issue under the *qui tam* provisions." *See* Boese Treatise § 4.02[D] (2004-1 Supp.).

The Tenth Circuit's decision presents a substantial risk of forum-shopping by opportunistic relators, and it risks inconsistent decisions for the same defendants across different jurisdictions. It also vastly complicates the "original source" inquiry, replacing a bright line test that requires firsthand knowledge with an amorphous totality-of-the-circumstances analysis that looks to the "character of the relator's discovery and investigation" and seeks to determine whether relators have achieved some vague and unspecified level of "independent investigation, deduction, and effort." That outcome is particularly unwelcome in light of the fact that, in cases (such as this one) in which the United States has declined to intervene, more than 80% are ultimately

resolved with no recovery being awarded. *Id.* The Tenth Circuit's approach thus increases the volume, and complicates the disposition, of cases that typically turn out to be meritless.

This case presents an opportunity to provide clarity where it is urgently needed by giving guidance on the proper interpretation of "direct" knowledge under the FCA's "original source" exception.

A. The Tenth Circuit's Holding That "Direct" Knowledge Under The Original Source Provisions Of The FCA Need Not Be Personal, Firsthand Knowledge Conflicts With The Decisions Of Other Courts Of Appeals.

1. The law in the Tenth Circuit is that a relator need not have personal, firsthand knowledge of any element of the fraud alleged in a *qui tam* action to possess "direct" knowledge sufficient to qualify as an "original source." Instead, the Tenth Circuit held that a speculative claim based on secondhand information gathered by a relator will suffice as long as the relator demonstrates sufficient "independent investigation, deduction, and effort." By allowing a case to proceed even when relators are not witnesses or participants and thus obtain their information by means that are indisputably *indirect*, the Tenth Circuit has, for all practical purposes, excised the "direct knowledge" requirement from the statute.

The Tenth Circuit's decision in this regard was unambiguous. The court of appeals stated, for example, that "[k]nowledge of the actual fraudulent conduct is not necessary," Pet. App. at 9a, and that a requirement that relators "possess information about the particular fraud," had "no basis in Tenth Circuit precedent." *Id.* The court went so

far as to deem "irrelevant" the fact that relators were not "insiders of Comstock" and did not witness or participate in any part of the allegedly fraudulent activity. *Id.* at 13a. The court likewise gave little weight to the fact that relators relied exclusively on public records in assembling their complaint. *Id.*

The court held instead that "[i]t is the character of the relator's discovery and investigation that controls this [original source] inquiry." *Id.* at 10a. The panel elaborated that

> [t]here must be some consideration to the availability of the information and the amount of labor and deduction required to construct the claim. Relators sorted through relatively obscure public documents and, together with personal royalty records, used these documents to discover and support their claims of the alleged fraud. . . . It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud. . . . Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

Id. at 13a-14a. The Tenth Circuit thus made investigation and speculation rather than observation and participation the touchstone of "direct knowledge."

In so doing, the court of appeals extended previous Tenth Circuit authority that had watered down the "direct knowledge" requirement. In *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787 (10th Cir. 2002), for example, a divided panel held that a relator who had some inside knowledge of the defendant's activities but no firsthand knowledge of the actual fraud nevertheless possessed the requisite "direct" knowledge. The relator in

Stone was a former employee of the defendant who had firsthand knowledge of allegedly defective designs for manufacturing pondcrete blocks, but was fired before witnessing any of the toxic waste leakage that the defendant fraudulently concealed to the government. As Judge Briscoe pointed out in dissent, the relator's knowledge of the fraud was thus not based on observation, but instead derived from mere speculation that the design flaw had resulted in toxic leakage and led to the subsequent cover-up. *Id.* at 816-17 (Briscoe, J., dissenting); *see also id.* (suggesting that the panel decision was contrary to *Aflatooni*, 163 F.3d 516, and *Kreindler*, 985 F.2d 1148).

2. The Tenth Circuit's expansive view of the FCA's "direct" knowledge requirement squarely conflicts with the law of the Second, Eighth, Ninth, and D.C. Circuits, all of which require an original source to have personal, firsthand knowledge of at least one essential element of the allegedly fraudulent transaction.

In the Eighth Circuit, for example, "[a] relator has direct knowledge when he sees [the facts underlying the fraud] with his own eyes." *Kinney*, 327 F.3d at 674. The Eighth Circuit's decision in *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995) vividly illustrates the wide divergence between the Eighth Circuit and Tenth Circuit on the definition of "direct." In *Barth*, a relator named Priem brought a *qui tam* action alleging that the defendant submitted payroll reports on a federal project that fraudulently mischaracterized the nature of its employees' work. Priem, a business representative of the workers' union, witnessed the employees performing certain kinds of work, obtained publicly-available reports that included classifications of the employees' work, and interviewed employees to confirm his suspicions that the employees were

not performing the reported work. *Id.* at 701-02, 703-04. In short, Priem did at least as much investigation as the relators in this case, including personal interviews of involved parties. Nevertheless, the Eighth Circuit, applying a firsthand knowledge requirement, held that "Priem did not have direct knowledge of the manner in which Ridgedale classified its employees; instead he obtained this information through intermediary sources," and thus was not an "original source." *Id.* at 703. Were this case to have been transferred to the Eighth Circuit rather than to the Tenth, *Barth* would have unquestionably dictated the opposite outcome in this case.

The law is the same in the Ninth Circuit, which has held that an original source "must show that he had firsthand knowledge of the alleged fraud." *Aflatooni*, 163 F.3d at 525; *see also United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir. 1996) (relators not original source because they "derived [the knowledge] secondhand from [defendant's employee], who had firsthand knowledge of the alleged fraud as a result of his employment at [defendant]"). So, for example, in *United States v. Alcan Electrical & Engineering, Inc.*, 197 F.3d 1014 (9th Cir. 1999), the Ninth Circuit held that a relator lacked direct knowledge of a contractor's allegedly illegal prevailing wage arrangement when the relator had not received a lower wage because of the agreement, did not "participate[] in the negotiating, drafting, or implementation of the Inside Agreement," and had not alleged that he "played any role in submitting false claims to the government." *Id.* at 1021. There is little doubt, then, that Kennard and Wright, who similarly did not participate in or observe any aspect of the alleged fraud, could not proceed with their claims in the Ninth Circuit.

The Second Circuit's approach is the same. In *Kreindler*, 985 F.2d 1148, for example, the relator law firm learned of alleged misrepresentations concerning the manufacture of Black Hawk helicopters while litigating a related wrongful death action. Following settlement, the relator filed its *qui tam* suit based on that information, which had been publicly disclosed through the litigation. Despite noting that relator had conducted "collateral research and investigations," the Second Circuit held that the relator did not have "direct" knowledge because the information was derived from the defendant and its employees. *Id.* at 1159 ("UTC was clearly the source of the core information"); *accord United States v. New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (per curiam) (a relator does not have direct and independent knowledge "if a third party is 'the source of the core information' upon which the *qui tam* complaint is based") (quoting *Kreindler*, 985 F.2d at 1159)). This case is no different than *Kreindler* – in both cases, the relators' information was derived from documents that provided the core information; the fact that the documents were public in this case makes the relators' knowledge even *more* attenuated than the *Kreindler* relator's knowledge, which was derived from documents produced directly by the defendant itself.

The D.C. Circuit, too, has held that, "[i]n order to be 'direct,' the information must be first-hand knowledge," *Findley*, 105 F.3d at 690, and it has permitted *qui tam* actions premised on investigations to proceed only when the investigations have been supplemented by "personal knowledge" of the relator. *Springfield*, 14 F.3d at 656-57. *Cf. Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580 (4th Cir. 2000) (citing *Devlin* and *Springfield* in holding that relator was not an original source).

3. Although the Tenth Circuit sought to minimize the differences between its approach and the majority rule in the circuits, the court's efforts merely serve to underscore the conflict. At the outset, the Tenth Circuit ignores cases such as *Barth* and *Devlin* in which relators were held not to be original sources despite "independent investigation, deduction, and effort" (Pet. App. 13a-14a) – indeed, in *Barth*, substantial investigation. The decision below cannot be squared with those cases.

The Tenth Circuit's effort to align its decision with that of the D.C. Circuit in *Springfield* is similarly unpersuasive. In *Springfield*, the D.C. Circuit held that a relator with firsthand knowledge of fraudulent billing practices to the government had "direct and independent knowledge." In that case the relator was able to deduce that an arbitrator fraudulently billed the government for work because the relator participated in the arbitration and thus knew that work had not been done on particular days. The Tenth Circuit glossed over that the relator in *Springfield* had personal, firsthand knowledge, interpreting *Springfield* to hold that mere investigation is sufficient for "direct and independent knowledge." *See* Pet. App. at 12a. Yet the D.C. Circuit in *Springfield* expressly relied upon relator's unique "personal knowledge." *See* 14 F.3d at 657 (Relator "bridged the gap by its own efforts and experience, which in this case included *personal knowledge* of the arbitration proceedings and interviews with individuals and businesses identified in the telephone records.") (emphasis added); *see also Devlin*, 84 F.3d at 362 (noting that, in *Springfield*, "the relator's own personal knowledge was essential to his conclusion that a fraud had been committed").

The Tenth Circuit's discussion of *Findley*, *Aflatooni*, and *Kreindler* is equally flawed. Despite the Tenth Circuit's

effort to pigeonhole those cases as ones in which the claims were "based solely on the action of others," Pet. App. 10a, those decisions make clear that the lack of personal, firsthand knowledge, not the lack of effort or investigation, made the difference. For example, although the Tenth Circuit sought to confine *Kreindler* as a case in which the relator merely "took someone else's labor and investigation and gave it legal meaning," Pet. App. 12a, the Second Circuit stated that the relator had conducted its own "collateral research and investigations." 985 F.2d at 1159. *Compare also* Pet. App. 14a (relators must qualify as original source because they "ferreted out the alleged fraud") *with Aflatooni*, 163 F.3d at 525 (purpose of FCA was to "ferret out fraud by encouraging persons *with firsthand knowledge* of the alleged wrongdoing to come forward") (emphasis added; internal quotation marks omitted).

The Tenth Circuit's decision allows any member of the public to be an original source, as long as that person puts in the requisite effort and investigation; other courts of appeals have unambiguously rejected that approach. *See, e.g.*, *Barth*, 44 F.3d at 703 (stating that direct knowledge requirement was intended to avoid lawsuits by "'disinterested outsiders' who 'simply stumble across an interesting court file'") (citation omitted); *Devlin*, 84 F.3d at 362 (finding relator's knowledge was not direct because "anyone could easily have done what [relator] did . . . . and it is a virtual certainty that federal investigators would have done precisely the same thing"); *cf. Kreindler*, 985 F.2d at 1158 ("[Section] 3730(e)(4) was designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator") (internal quotation marks omitted). The Tenth Circuit's approach is flatly contrary to these decisions.

4. The direct split described above reflects widespread confusion on this issue in the federal courts. For example, although the Tenth Circuit is the only court of appeals to squarely adopt a "sweat of the brow" test for "direct knowledge," the Seventh Circuit in *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), suggested in dicta that a relator could qualify as an original source based on knowledge gained *only* from public disclosures of all elements of the fraud. *Id.* at 864. Similarly, in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), the Eleventh Circuit held that a relator was an "original source" where he "acquired his knowledge of [defendant's] alleged wrongdoing through three years of his own claims processing, research, and correspondence with members of Congress and HCFA." *Id.* at 568.[5] And the Third Circuit in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), stated in dicta that "relators may also qualify if their information results from their own investigations," though it also held that a relator must possess "substantive information about the particular fraud," *id.* at 1160-61, a requirement that the Tenth Circuit explicitly rejected, *see* Pet. App. at 9a.

The same conflicting approaches are reflected in the decisions of the district courts. Thus, for example, one court, citing both the Tenth Circuit's decision here and the Seventh

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[5] Although the Eleventh Circuit thus seemed to allow a *qui tam* action to proceed on the basis of knowledge gained primarily through investigation, the relator in *Cooper* appears to have had firsthand knowledge of the alleged Medicare fraud, because he observed the fraudulent handling of his *own* benefit claims. 19 F.3d at 568.

Circuit's decision in *Farmington*, held that a relator without personal knowledge who acquired his information solely through investigation nevertheless had "direct" knowledge because the fraud alleged was "quite complex, involving various schemes acted on an international stage over portions of four decades." *United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp. 2d 939, 954 (N.D. Ill. 2004). Another court, citing *Springfield, Barth, and Alcan*, held that a relator was not an original source because "he was not a percipient witness to any of the alleged facts upon which his allegations are based." *United States ex rel. Hansen v. Cargill, Inc.*, 107 F. Supp. 2d 1172, 1183 (N.D. Cal. 2000); *see also United States ex rel. Koch v. Koch Industries, Inc.*, 1995 WL 812134, at *11-12 & n.16 (N.D. Okla. 1995) (expressly rejecting the Eighth Circuit's decision in *Barth* and holding that relators were an original source when they gathered information based on "their own extensive investigation of Defendants' oil and gas purchasing practices").

It is thus clear that there is both a sharp conflict and general confusion over the scope of the "direct knowledge" limitation in the FCA's *qui tam* provisions.

B. The Tenth Circuit's Reading Of "Direct" Knowledge Is Incorrect And Overly Expansive.

The Tenth Circuit's decision also warrants review because the court's reading of the "direct knowledge" requirement cannot be squared with the text or purpose of the statute, and provides a thoroughly unworkable standard that is likely to create significant mischief in the lower courts.

1. The text of the original source provision requires that relators have knowledge of the alleged fraud that is "direct

and independent." The word "direct" means "immediate; proximate; by the shortest course." Black's Law Dictionary 413 (5th ed. 1979). Thus "direct evidence" is evidence "in form of testimony from a witness *who actually saw, heard, or touched* the subject of interrogation." *Id.* (emphasis added). Consistent with those dictionary definitions, the clear majority of circuits to have considered the issue have required an original source to have personal, "firsthand" knowledge, generally obtained by direct observation of or participation in the alleged fraud. *See, e.g.*, *Findley*, 105 F.3d at 690 ("In order to be 'direct,' the information must be first-hand knowledge."); *Aflatooni*, 163 F.3d at 525 (relator "must show that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his 'own labor unmediated by anything else.'") (citation omitted); *Barth*, 44 F.3d at 703 ("A relator is said to have direct knowledge of fraud when he saw [it] with his own eyes.") (internal quotation marks omitted; alterations in original).

The Tenth Circuit's approach cannot be squared with the plain meaning of the word "direct." To the contrary, the Tenth Circuit allows a relator to proceed when his knowledge of the alleged fraud is, as here, entirely *indirect* – *i.e.*, when relators' allegations are based entirely on sorting though "public documents" and applying "independent investigation, deduction, and effort" to discover the alleged fraud. But even a thorough investigation into public documents cannot generate "direct" knowledge of an alleged fraud; such investigation simply does not allow relators to observe – to "s[ee], hear[], or touch[]"– any of the relevant information. Black's Law Dictionary at 413.

2. Nor can the Tenth Circuit's approach be squared with the purpose of the original source provision. That provision is an exception to the public disclosure jurisdictional bar

established by § 3730(e)(4)(A), and it is implicated only when, as here, the relators file their complaint *after* the relevant information has been disclosed publicly and is thus available to members of the public and to government investigators. In those circumstances, the potential for opportunistic lawsuits is at its apex, and the government's interest in encouraging additional *qui tam* suits wanes. As the D.C. Circuit noted, "[o]nce the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds. Allowing *qui tam* suits after that point may either pressure the government to prosecute cases when it has good reasons not to or reduce the government's ultimate recovery." *Findley*, 105 F.3d at 685.

The exception Congress created is thus narrow, and was enacted to encourage "individuals who are close observers or otherwise involved in the fraudulent activity" to come forward to break the "conspiracy of silence" surrounding a fraud. S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. It makes sense to limit the original source exception to observers or participants who possess some firsthand knowledge of fraud, because they can provide the government assistance in investigating and prosecuting the fraud (for example, by acting as witnesses at trial) in a way that possessors of secondhand information cannot. *See, e.g.*, Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions under the False Claims Act*, 24 Pub. Contract L.J. 237, 280-81 (1995) ("Relators who possess 'direct' information are likely witnesses and because of their anticipated continued participation are entitled to a portion of the Government's recovery. Conversely, relators who possess indirect information – hearsay information – are less likely to be valuable witnesses and, therefore, their limited ability to

contribute to the Government's action merits their dismissal."). As the Eighth Circuit noted, "[t]he False Claims Act ... is not intended to create windfalls for people with secondhand information of the wrongdoing." *Kinney*, 327 F.3d at 674.

The Tenth Circuit has strayed far from this congressional intent. First, it has expanded the narrow class of potential relators who can sue after public disclosure to include *anyone* who is willing and able to conduct an "independent investigation, deduction, and effort" to uncover the fraud.

Second, the Tenth Circuit deemed "irrelevant" what Congress viewed as critical. As noted, Congress' central objective was to encourage reporting of fraud by "individuals who are close observers or otherwise involved in the fraudulent activity" – *i.e.*, classic "insiders." Yet the Tenth Circuit criticized the district court for "rel[ying] heavily on the fact that Relators were not members of the Tribe or insiders of Comstock, *a concern we deem irrelevant to the current inquiry.*" Pet. App. 13a (emphasis added). Most circuits have correctly recognized that, although an original source need not always be a classic "insider," Congress understood such an insider to be the paradigmatic "original source" and believed the direct, firsthand knowledge possessed by such an insider to be the type of information an original source should possess. *See Stinson*, 944 F.2d at 1161 ("The paradigmatic 'original source' is a whistleblowing insider."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) ("The paradigm *qui tam* plaintiff is the 'whistleblowing insider.'"). The Tenth Circuit's characterization of relators' lack of connection to either Comstock or the Tribe as "irrelevant," Pet. App. 13a, therefore, while consistent with the Tenth Circuit's focus on

the amount of effort expended by relators, demonstrates just how far the Tenth Circuit has strayed.

That is not to say that "independent investigation, deduction, and effort" are of no consequence under the FCA. To the contrary, *prior* to public disclosure, a relator may bring suits based on secondhand inferences, investigation into public documents, and even interviews, audits, and internal memos. *See, e.g.*, *Stinson*, 944 F.2d at 1161 ("nothing contained here would bar suit by someone who learned of the fraud from an insider, if the information had not yet been publicly disclosed"). Once the information has been disclosed publicly, however, the balance of interests changes, and the need to prevent opportunistic lawsuits requires that only knowledge that is direct – personal and firsthand – is sufficient.[6]

3. Finally, the Tenth Circuit's approach is unworkable. Interpreting "direct" to mean "firsthand" provides a clear standard to apply in making the original source determination: either the relator observed the fraud (or some part of the fraud) with his own eyes, or he did not. In contrast, the Tenth Circuit's interpretation of the "direct" knowledge requirement provides no meaningful standards for determining whether a potential relator's investigation is sufficient to yield "direct" knowledge. The Tenth Circuit's

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[6] It is possible to gain firsthand knowledge by investigation. *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999), is a good illustration. In that case, the relator gathered information that a bus service was operating its bus routes in violation of its representations to the government by actually observing buses on the routes – literally, seeing the evidence with his own eyes. But that type of firsthand observation is a far cry from the review of public documents and federal reports that relators undertook here.

approach – which focuses on the "character of the relator's discovery and investigation," Pet. App. at 10a – is not predictable, workable, or even intelligible, and it will doubtlessly be litigated extensively by opportunistic would-be relators. The Tenth Circuit has essentially adopted a formless "totality of the circumstances" inquiry that allows a court to deem a *qui tam* plaintiff an "original source" whenever the court believes it would be fair and just to do so. Given the clarity of the text that Congress actually adopted, and the purposes for which Congress adopted that text, there is neither need nor license to adopt such a standardless inquiry.

C. Review Of The Tenth Circuit's Decision Is Urgently Needed.

Review by this Court to clarify the proper definition of "direct" knowledge is urgently needed. The FCA is an important and frequently litigated statute. Since 1986, the number of *qui tam* complaints filed each year has risen, from a low 33 in 1987 to the current rate of 300 to 500 new cases each year. *See* Statistics Under the *Qui Tam* Provision of the False Claims Act Amendment of 1986 (Dep't of Justice, Sept. 30, 2002), *reprinted in* 2 Boese Treatise, Appendix H (2003-2 Supp.). Between 1986 and September 30, 2002, relators filed 3,954 *qui tam* complaints. *Id.* In that period, as a leading treatise has noted, "the 'original source' rule has become (along with 'public disclosure') the most litigated – and confused – issue under the *qui tam* provisions." *See Boese Treatise* § 4.02[D] (2004-1 Supp.).

The Tenth Circuit's decision greatly exacerbates the confusion, and presents substantial risks of forum-shopping by opportunistic relators and arbitrary decisions for defendants. Indeed, the series of "fraudulent royalty" claims brought by relators such as Kennard and Wright highlight the

potential for unfairness. Many defendants had cases decided under Tenth Circuit law rather than under more favorable Eighth Circuit or Ninth Circuit law *only* because their cases were transferred to the MDL docket. The outcome of litigation should not depend on whether or not one's suit is similar to suits pending against other defendants, or on where the relator chooses to bring suit.

Moreover, the Tenth Circuit decision threatens to vastly expand the class of relators who can bring suit, transforming the FCA's whistleblower provisions into authorization for private bounty hunters to file suit based upon speculation and hearsay uncovered in public records, and turning the Tenth Circuit into a haven for *qui tam* relators able to meet that court's lax "direct knowledge" standard. This case aptly illustrates how a relator with mere speculation and no uniquely useful knowledge can become an "original source" under the Tenth Circuit standard. Relator Wright, as the court notes, "*speculated* that Comstock was underpaying him and others in the area, including the Tribe." Pet. App. at 2a (emphasis added). Relator Kennard sorted through various public documents, but his conclusions about NGL production, payments under the leases to the Tribes, and even the legal status of the leases were all speculative and inferential.[7] To bring a successful *qui tam* action, Wright

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[7] This case demonstrates the danger of allowing a relator to rely entirely on secondhand information. To cite just one example, Kennard relied on a MMS Mineral Revenue Report from 1996 and the location of a gas processing plant near the Tribe's reservation to conclude that the Tribe was not being paid sufficient NGL royalties. *See* Appendix to Opening Brief of Appellants Kennard and Wright, at 161-63 (10th Cir. filed Mar. 24, 2003). But, Kennard ignored that the gas processing plant was not built until some time in 1996, *see id.* at 270, and that the MMS Reports from

and Kennard needed additional information, in this case information possessed by employees of Comstock or members of the Tribe. As the district court noted, relators' complaint consisted of little more than "throwing a lot of mud on the wall . . . [and] hoping some of it sticks." *See supra* at 8.

The Tenth Circuit's approach is particularly troubling in light of the compelling evidence that many of these speculative lawsuits are, like the action here, meritless. Since 1986, the United States has intervened in only 718 of the more than 3200 cases in which intervention decisions have been made. *See* 2 Boese Treatise, Appendix H (2003-2 Supp.). More than 80% of the cases in which the United States declined to intervene have been dismissed with no recovery being awarded. *Id.* Thus, there are many cases filed in which a relator is pursuing claims where there is little or no actual evidence of fraud. To make matters worse, the Department of Justice must expend substantial resources to investigate each *qui tam* complaint filed to determine whether or not to intervene. *See* 31 U.S.C. § 3730 (a) and (b).

The Tenth Circuit's relaxed "original source" standard will only add to this problem. Once a relator files a *qui tam* claim without firsthand knowledge of the particular fraud, both the Department of Justice and individual defendants are forced to investigate claims even though the relator offers no valuable firsthand information to help uncover fraud. And if the relator qualifies as an "original source," he can obtain a portion off the recovery without providing any meaningful

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1997-1999 showed that NGL royalties *were* paid to the Tribe for those subsequent years, *see id.* at 337-345.

assistance to the government. The "direct . . . knowledge" requirement is designed to limit this scenario from occurring.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 2004

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Appendix A

United States Court of Appeals,
Tenth Circuit

Don C. KENNARD and Harrold E. Wright, Plaintiffs-Appellants,
v.
COMSTOCK RESOURCES, INC.; Comstock Oil & Gas, Inc.; Black Stone Oil Co.; WT Carter & Bro; and Willow Creek Resources, Inc., Defendants-Appellees.
United States of America and Burlington Resources Oil & Gas Company LP, Amici Curiae

No. 03-8012

April 5, 2004.

Before *EBEL*, *McKAY*, and *LUCERO*, Circuit Judges.

McKAY, Circuit Judge.

Appellant Relators Mr. Kennard and Mr. Wright brought this *qui tam* action on behalf of the United States Government against Appellees Comstock Resources, Inc., *et al.*, ("Comstock") pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3730 ("FCA"). The allegations center around oil and gas leases between Comstock and an Indian Tribe. The Indian leases are subject to regulation by the Secretary of the Interior who acts as a fiduciary for the Tribe. Comstock pays royalties owed to the Tribe to the Mineral Management Service ("MMS"), an agency under the Secretary. The MMS is responsible for (1) collecting royalties, (2) ensuring the accuracy of those payments with audits, and (3) remitting the royalty payments to the Tribe.

Relator Wright owned royalty interests in a tract of land near the Indian Tribe's Reservation and had been receiving royalty payments for gas wells located on the property for over twenty-five years. When the operator on Mr. Wright's property sold its lease interests to Comstock, Mr. Wright's royalty payments dropped dramatically. Based on this dramatic drop, Mr. Wright speculated that Comstock was underpaying him and others in the area, including the Tribe.

Mr. Wright contacted Relator Kennard with his information. Relator Kennard researched and investigated public records and discovered that the Indian leases might have expired. Based on the investigation and Relators' extensive oil and gas experience, they concluded that Comstock was underpaying royalties to the Tribe and also that Comstock knew that it was underpaying the Tribe. After consultation with attorneys, Relators concluded that Comstock had committed fraud and violated the FCA. The attorneys, including Mr. Sydow, began drafting a complaint. Relators invited the Tribe to join the suit as co- Relators and the Tribe declined.

On October 21, 1998, Relators sent the required "Disclosure Statement" to the Government to which a yet-unfiled complaint was attached. On October 26, 1998, Mr. Sydow filed suit acting as the Tribe's attorney instead of as Relators' attorney. The following day, Relators filed this suit alleging essentially the same things as the Sydow Complaint. Relators allege that Mr. Sydow essentially stole their information in preparing the Tribe's complaint.

The FCA imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay

or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). Violators are "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). Pursuant to 31 U.S.C. § 3730, a private individual, known as a relator, "may bring a civil action for a violation of [31 U.S.C. § 3729] for the person and for the United States Government . . . in the name of the Government." 31 U.S.C. § 3730(b)(1). The relator then receives a share of any Government recovery. 31 U.S.C. § 3730(d). The relator's *qui tam* complaint is filed under seal and served on the Government with "a written disclosure of substantially all material evidence and information" in the relator's possession. 31 U.S.C. § 3730(b)(2). The Government may then either choose to intervene and take over litigation or decline to intervene, "in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(2), (4).

In the instant case, the district court dismissed Relators' FCA *qui tam* complaint for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4)(A) which provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

On appeal, we are asked to decide whether the district court

erred in dismissing Relators' complaint for lack of subject matter jurisdiction on grounds that (1) the current action was barred because of a prior public disclosure and (2) Relators did not qualify as an original source. We review *de novo* the district court's dismissal of Relators' FCA *qui tam* action for lack of subject matter jurisdiction. *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 (10th Cir. 1996) ("review of the district court's dismissal under the FCA jurisdictional bar is plenary" because "the jurisdictional question is necessarily intertwined with the merits.").

Application of the 31 U.S.C. § 3730(e)(4) jurisdictional bar requires a four-step inquiry:

> (1) whether the alleged "public disclosure" contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made "public" within the meaning of the False Claims Act; (3) whether the relator's complaint is "based upon" this public disclosure; and, if so, (4) whether the relator qualifies as an "original source."

United States ex rel. Hafter v. Spectrum Emergency Care, 190 F.3d 1156, 1161 (10th Cir. 1999) (quoting *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1544 (10th Cir. 1996)). "A court should address the first three public disclosure issues first. Consideration of the fourth, 'original source' issue is necessary only if the court answers the first three questions in the affirmative." *Id.* Therefore, we must first address whether the Sydow Complaint operated as a public disclosure which would operate to bar the current action unless Relators are an original source.

Relators argue strenuously that because Mr. Sydow allegedly

unethically used their information in drafting his complaint for the Tribe that this court should not validate that fraud. However, we are constrained by the law as it is written. The jurisdictional bar in 31 U.S.C. § 3730(e)(4) does not contemplate an exception to public disclosure unless the person is an original source. The remedy for the alleged conversion of information in this case lies elsewhere. Section 3730(e)(4) operates to satisfy the dual goals of "avoidance of parasitism and encouragement of legitimate citizen enforcement actions." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). "Consistent with these purposes, we believe the threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis." *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992). Once a public disclosure is made, even if by somewhat nefarious means, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5).

In the instant case, the alleged public disclosure is the Sydow Complaint. Civil hearings are specifically referenced in 31 U.S.C. § 3730(e)(4)(A). Section 3730(e)(4) lists "[(1)] a criminal, civil, or administrative hearing, [(2)] a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, [or (3)] the news media" as sources available for public disclosure. We have repeatedly held that prior civil actions are public disclosures under the FCA. *Precision*, 971 F.2d at 553-54; *see also United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1279 (10th Cir. 2001); *Hafter*, 190 F.3d at 1161 n.6. Additionally, "every court of appeal to have addressed the question has held that any information disclosed through civil litigation and on file with the clerk's

office should be considered a public disclosure . . . for purposes of section 3730(e)(4)(A)." *Ramseyer*, 90 F.3d at 1519 n.3 (quoting *United States v. Northrop Corp.*, 59 F.3d 953, 966 (9th Cir. 1995)) (internal quotations omitted). The filing of the Sydow Complaint commenced a civil action on behalf of the Tribe against Comstock. Thus, the first of the threshold inquiries, whether the alleged public disclosure contains allegations or transactions from one of the listed sources, is satisfied.

We must next address whether the alleged disclosure has been made public within the meaning of the FCA. Relators argue that because the disclosure in this case was only made to a single Government filing clerk who stamped the Sydow Complaint, no public disclosure occurred. This argument is unpersuasive. Section 3730(e)(4) operates as a "quick trigger." *Precision*, 971 F.2d at 552. Once a complaint is filed, a civil action has commenced and public disclosure has occurred. There is no requirement that a certain number of people read or receive the information. Relators rely on *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1204-05 (10th Cir. 2003) (en banc), in which we held that the allegations "must have been made known to the public through some affirmative act of disclosure." However, disclosure to a single filing clerk was enough in the instant case because the filing of the civil action in itself was the affirmative act of disclosure. It is not necessary that the filing clerk or any member of the public read the complaint. Additionally, in *Holmes* we specifically held that a public disclosure can occur to a single person. 318 F.3d at 1206 n.5.

Relators' argument that providing a complaint to the Government in advance of filing immunizes a relator from the operation of the FCA's public disclosure bar is similarly

misdirected. Section 3730(e)(4) does not contain an exception for complying with the mandatory jurisdictional requirements of § 3730(b)(2).[1] Additionally, disclosure to the Government through § 3730(b)(2) is not a public disclosure contemplated by § 3730(e)(4). As discussed above, § 3730(e)(4) specifically lists the following sources as avenues for public disclosure: [(1)] "a criminal, civil, or administrative hearing, [(2)] a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or [(3)] the news media." "[I]n order to be publicly disclosed, the allegations or transactions upon which a *qui tam* suit is based must have been made *known to* the public through some affirmative act of disclosure." *Ramseyer*, 90 F.3d at 1519 (emphasis added). This requirement clearly contemplates that the information be in the public domain in some capacity and the Government is not the equivalent of the public domain.

The first two inquiries being answered in the affirmative, we then ask whether Relators' complaint is based upon the public disclosure. "The test is whether 'substantial identity' exists between the publicly disclosed allegations and the *qui tam* complaint." *MK-Ferguson*, 99 F.3d at 1546 (10th Cir. 1996) (quoting *Precision*, 971 F.2d at 553-54). Relators have conceded that the complaints at issue are substantially

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[1] Section 3730(b)(2) provides:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. *Id.*

similar. *See* Aplt. Br. at 17.[2] We find no merit in Relators' argument that because the Sydow Complaint was allegedly based solely and exclusively on Relators' information and complaint that it is impossible for Relators' complaint to be based upon the Sydow Complaint. "'Based upon,' in 31 U.S.C. § 3730(e)(4)(A), means 'supported by.'" *MK-Ferguson*, 99 F.3d at 1545 (quoting Precision, 971 F.2d at 552). Whether Relators' *qui tam* complaint was already drafted when the Sydow Complaint was filed is irrelevant. A relator need not have learned of the basis for the *qui tam* action from the public disclosure for its action to be considered based upon that public disclosure if the allegations are substantially similar. *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 n.4 (10th Cir. 1996) (court rejected argument that because relator's discovery of alleged fraud occurred prior to public disclosure, complaint could not be based upon the later-occurring public disclosure); *see also MK-Ferguson*, 99 F.3d at 1546. Therefore, the first three steps of the 31 U.S.C. § 3730(e)(4) jurisdictional bar are satisfied and the Sydow Complaint operated as a public disclosure.[3]

Since we hold that the Sydow Complaint was a public disclosure, we must now address the fourth step--whether

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[2] Relators certainly have no quarrel with the findings of the court below that [t]he factual situation giving rise to the allegations is identical in each complaint[, and] the language detailing the alleged fraud in each complaint only varies slightly.

Aplt. Br. at 17 (quoting Aplt. App., Vol. II, at 493) (internal quotations omitted).

[3] There is no merit in Comstock's argument that disclosure of information to the Tribe was a former public disclosure. Disclosures of actions that, at the time, were not contained in any of the sources enumerated in 31 U.S.C. § 3730(e)(4)(A) are not public disclosures.

Relators were an original source. Section 3730(e)(4)(B) defines original source as "an individual that has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *See also United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 802-03 (10th Cir. 2002). "Direct and independent knowledge is knowledge marked by the absence of an intervening agency . . . [and] unmediated by anything but the relator's own labor." *Hafter*, 190 F.3d at 1162 (internal quotations and citations omitted). The burden is on the relator to show that he is an original source. *Stone*, 282 F.3d at 800. To meet this burden, a relator must provide more than an "unsupported, conclusory allegation" to show that he is an original source. *Id.* (quoting *Hafter*, 190 F.3d at 1162).

Comstock argues that Relators were not an original source because: (1) Relators did not possess substantive information about the particular fraud, (2) they were not insiders of Comstock or the Tribe, and (3) they relied on public records. Thus, Comstock asserts that Relators merely conducted background research and relied on their own expertise to speculate that Comstock had defrauded the Government. We will address each contention in turn.

Comstock's first assertion, that Relators did not possess information about the particular fraud, has no basis in Tenth Circuit precedent. Knowledge of the actual fraudulent conduct is not necessary. *See Stone*, 282 F.3d at 803. A relator "need only possess 'direct and independent knowledge of the *information on which the allegations are based*.'" *Id.* (quoting 31 U.S.C. § 3730(e)(4)(B)) (emphasis in original). A "relator need not . . . have in his possession knowledge of the actual fraudulent conduct itself; knowledge

'underlying or supporting' the fraud allegation is sufficient." *Id.* (quoting *Hafter*, 190 F.3d at 1162). Thus, the fact that Relators did not have knowledge of the actual alleged fraudulent submissions to the Government cannot disqualify them as an original source.

Comstock's second contention, that Relators were not insiders of either Comstock or the Tribe, is also without merit. Our review of the relevant case law revealed no requirement that a relator be a corporate insider. Additionally, we can think of no valid reason for creating such a restriction.

The third contention, that Relators relied on public records, deserves more attention. We have not and will not adopt any bright-line rule disqualifying a relator as an original source when the relator examines public records. However, the degree and character of such reliance is necessarily deserving of our attention. A mere compilation of documents or reports already in the public domain will not allow a relator to qualify as an original source. However, a complete and thorough investigation of a fraud on the Government will likely necessarily involve some review of contracts, documents, or other information in the public domain. It is the character of the relator's discovery and investigation that controls this inquiry.

On one end of the spectrum, there are several cases that define an action based solely on the labor of others. In *United States ex rel. Findley v. FPC-Boron Employees' Club*, the Court of Appeals for the Federal Circuit held that "[a] relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation have already been publicly disclosed." 105 F.3d 675, 688 (D.C. Cir.

1997). The court further stated that "[i]f a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a *qui tam* action cannot proceed." *Id.*; *see also MK-Ferguson*, 99 F.3d at 1548 (concluding plaintiff did not qualify as original source because his complaint merely tracked an audit report; he neither observed nor discovered the purported fraud); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995) (public disclosure of material elements of fraud bars *qui tam* action even if disclosure itself does not allege wrongdoing because FCA does not require allegations to have statutory basis); *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 163 F.3d 516, 526 (9th Cir. 1999) (relator who offered only speculation and conjecture that defendant committed alleged fraud did not qualify as original source). Thus, when a relator's *qui tam* action is based solely on *material elements* already in the public domain, that relator is not an original source.

Similarly, in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, the Second Circuit held that an attorney who participated in the initial litigation on which his *qui tam* action was based was not an original source. 985 F.2d 1148, 1159 (2d Cir. 1993). The court stated that "[t]he fact that [the relator] conducted some collateral research and investigations[,] . . . as would be customary in such litigation, does not establish direct and independent knowledge of the information on which the allegations are based." *Id.* (internal quotations omitted). The court further explained:

> Nor does the fact that [the relator's] background knowledge enabled it to understand the significance of the information acquired . . . make its knowledge independent of the publicly disclosed information. If

> that were enough to qualify the relator as an original source then a cryptographer who translated a ciphered document in a public court record would be an original source, an unlikely interpretation of the phrase.

Id. (internal quotations and citations omitted).

Our case is easily distinguished from both *Findley* and *Kreindler*. Unlike the relator in *Findley*, Relators in our case did not merely attach a legal label to a fraud already noticed in the public domain. While "relator Findley's complaint merely echoe[d] publicly disclosed, allegedly fraudulent transactions," *id.*, Relators in our case conducted their own investigation and crafted their own claim of the fraud on the Government. Additionally, unlike the relator in *Kreindler*, Relators in our case cannot be compared to mere cryptographers who translated a document. Nor can they be compared to an attorney who took someone else's labor and investigation and gave it legal meaning. While some of the information discovered by Relators was in the public domain, Relators did not merely label or translate an already publicly disclosed fraud.

On the other end of the spectrum, our case parallels the court's statement in *Springfield* where "[the relator] started with innocuous public information [and] completed the equation with information independent of any preexisting public disclosure." 14 F.3d at 657. Relator Wright did not refer to, examine, or rely on any public records. He relied exclusively on his own personal, private royalty records and statements from Comstock and other oil companies. He noticed that when Comstock took over the lease on one of his properties, his royalty payments dropped dramatically. Relator Kennard did examine public records in the course of

his independent investigation at the Railroad Commission of Texas and the Texas General Land Office to support the discovery of the alleged fraud. However, many investigations of fraud on the Government will necessarily involve a review of the relevant and publicly available Government contracts out of which the fraud claim arises. Mr. Kennard did not merely compile statistics; he did his own research and investigation. He did not rely on a Government report dealing with the allegations and transactions on which the current *qui tam* action is based because no such document exists.

The district court concluded that "Relators have merely compiled public information and because of their education and background were able to speculate that [Comstock] underpaid [ ] royalties." Aplt. App. at 498. We disagree. In its determination, the district court relied heavily on the fact that Relators were not members of the Tribe or insiders of Comstock, a concern we deem irrelevant to the current inquiry. The district court further relied on the fact that Relators used documents already in the public domain during their investigation. However, in the instant case, Relators' claim did not derive from a third party's research and investigation. Relators discovered the alleged fraud and Relators conducted the investigation. Our concern discussed in *Hafter* of the necessity to "weed out parasitic plaintiffs who offer only secondhand information, speculation, background information or collateral research" is not implicated in this case. 190 F.3d at 1162-63. There must be some consideration to the availability of the information and the amount of labor and deduction required to construct the claim. Relators sorted through relatively obscure public documents and, together with personal royalty records, used these documents to discover and support their claim of the alleged fraud. It is important to note that none of the public

documents disclosed the alleged fraud. It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud. Relators "ha[d] direct and independent knowledge of the fraud allegedly committed [since they are] the [people] responsible for ferreting it out in the first place." *Holmes*, 318 F.3d at 1207. Relators were not just assemblers of information. This case would not exist but for Relators sniffing it out. Through discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

Comstock also argues that Relators are factually incorrect in their claim of fraud on the Government. However, whether the "claim is ultimately flawed on the merits is an analytically distinct question from the one mandated by the FCA for establishing jurisdiction." *Stone*, 282 F.3d at 803. Thus, a "relator need only show that he possessed direct and independent knowledge of the information on which his claim is based, not that his claim is factually correct." *Id.*

We will briefly address Comstock's alternative argument that the FCA's *qui tam* provision does not authorize a relator to sue based upon losses allegedly suffered by an Indian Tribe. This argument is unsupported by the text of 31 U.S.C. § 3729(a)(7). "As in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Holmes*, 318 F.3d at 1208. Section 3729(a)(7)[4] provides that "a false record or statement to

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[4] Amicus Curiae Burlington Resources Oil & Gas Co.'s cites to cases involving § 3729(a)(1) are inapposite because the plain language of the statutes is distinctly different. Section 3729(a)(1) provides:

> Any person who . . . knowingly presents, or causes to be presented,

conceal, avoid, or decrease an obligation to pay or transmit money . . . to the Government" is actionable. Thus, the text broadly encompasses the fraud on the Government that occurs when a person or entity makes a false statement to the Government in order to decrease an obligation to *transmit* money to the Government. The *transmission* of funds to the Government is enough; there is no requirement in the text that the Government have an ongoing interest in the funds or that the Government itself suffer a loss. Additionally, transmit is defined as "to cause to go or be conveyed to another person or place: SEND." Webster's Third New International Dictionary 2429 (1986). Neither the text of § 3729(a)(7) nor the definition of transmit encompasses a necessary beneficial interest in the funds or a requirement

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> to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

Section 3729(a)(1) requires the existence of a "claim." Relying mostly on the word claim, some courts interpreting § 3729(a)(1) have held that this provision requires a showing of actual or potential loss to the Government. *See, e.g., Hutchins v. Wilentz Goldman & Spitzer*, 253 F.3d 176, 184 (3d Cir. 2001) (claims that do not result in economic loss to Government are not within scope of § 3729(a)(1)). Section 3729(a)(7), at issue in the instant case, does not encompass a similar restriction. Instead, it provides that:

> Any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . .. (emphasis added).

about how the funds are to be used or disbursed. Therefore, what the Government does with the royalties after they are deposited in the Treasury is of no consequence in the context of a *qui tam* suit.

Comstock's argument that the FCA does not authorize Relators to sue on behalf of the Tribe misstates the issue because a *qui tam* suit is on behalf of the Government, not the Tribe.[5] A *qui tam* suit is to recover penalties for false statements *to the Government*. Section 3730(b)(1) provides that a private person may bring an action "for the person and for the United States Government . . . in the name of the Government." The fraud is that which occurs when the person or entity makes a false statement to the Government. The fraud at issue is not that which occurs when the Indian Tribe receives less royalties than those which are due pursuant to the lease. While this suit relates to leases between Comstock and the Tribe, it is an action on behalf of Relators and the Government to redress an alleged fraud on the Government.

The mineral royalties at issue are paid to the Mineral Management Service of the United States Department of the Interior. Royalty payments due on Indian leases must be paid "in the time and manner as may be specified by the Secretary [of the Department of the Interior]." 30 U.S.C. § 1712(a). Royalties owed on Indian Tribe leases must be transmitted to "the MMS or such other party as may be designated." 25 C.F.R. § 211.40. Indian lessees like Comstock must report to the MMS the amount of royalties

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[5] Additionally, Comstock's argument that 31 U.S.C. § 3730(e)(3) deprived the district court of jurisdiction over this suit on behalf of the Government is incorrect. Comstock can point to no earlier suit by the Government that would trigger the statutory bar. The Tribe is not the equivalent of the Government.

due when they submit their royalty payments. *See* 30 C.F.R. § 210.52; 30 U.S.C. § 1713(a). The royalties paid to the MMS on Indian leases are transferred from an MMS Treasury account to separate accounts in the Treasury and the royalties are then disbursed to the appropriate Indian Tribe or allottee. *See* 30 C.F.R. §§ 218.51, 219.103. The MMS is required to collect payments and to have "a comprehensive . . . accounting and auditing system . . . to accurately determine oil and gas royalties." 30 U.S.C. § 1711(a).

As discussed above, Section 3729(a)(7) imposes liability for making "a false record or statement to conceal, avoid, or decrease an obligation to pay or *transmit* money . . . to the Government." (emphasis added). Pursuant to § 3729(a)(7), Relators are required to allege that Comstock had "an existing, legal 'obligation to pay or transmit money or property to the Government'" and that Comstock submitted false statements or records to conceal, avoid, or decrease that obligation. *See United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236-37 (11th Cir. 1999). Comstock cannot dispute that it had a legal obligation to transmit royalty payments to the Government. Relators have alleged that Comstock submitted false reports to avoid its obligation. We therefore hold that the plain language of § 3729(a)(7) squarely encompasses the fraud on the Government that occurs when a person or entity makes false statements to the United States to avoid transmitting to the Federal Treasury royalties they owe on Indian mineral leases.

REVERSED and REMANDED.[6]

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[6] Comstocks' motion for leave to file a supplemental brief in response to the brief for the United States which was received by the court on May 7, 2003, is GRANTED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

IN RE:	)
	) MDL Docket No. 1293
	)
NATURAL GAS ROYALTIES	)
QUI TAM LITIGATION	) *U.S. ex rel Kennard et*
	) *al. v. Comstock*
	) *Resources, Inc. et al.*
	) 01-MD-1679

ORDER ON DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants' Motion to Dismiss under Rule 12(b) for lack of standing, lack of subject matter jurisdiction, and failure to state a claim, and Defendants' renewed Motion to Dismiss under Rule 9(b). The Court, having considered the materials submitted, having heard oral argument of counsel, and being otherwise fully advised, FINDS and ORDERS as follows:

BACKGROUND

The Relators, Don Kennard and Harrold Wright, brought this *qui tam* action on behalf of the United States against the Defendants, Comstock Resources, Inc. (Comstock), under the False Claims Act (FCA) pursuant to 31 U.S.C. §§ 3729-3730. The allegations of this case center around nine oil and gas leases (Indian leases) covering lands within the Alabama and Coushatta Indian Reservation in Polk County, Texas. In the early 1990's, Comstock operated eight wells on the reservation according to terms set forth in the Indian leases,

and paid approximately $1,000,000 in royalties each month to the federal government for the benefit of the Tribe.

The Indian leases are subject to regulation by the Secretary of the Interior, who acts as a fiduciary for the Tribe. Pursuant to federal regulations, Comstock pays royalties owed to the Tribe to the Mineral Management Service (MMS), an agency under the Department of Interior. The MMS is responsible for: (1) Collecting royalties payable to the Tribe; (2) ensuring the accuracy of those payments by performing audits; and (3) remitting those royalty payments back to the Tribe.

The MMS performs these functions by reviewing MMS Forms that are submitted by operators. In this case, the Defendants were required to submit Form MMS-2014 which states the type of production (e.g. oil condensate, processed [residue] gas, unprocessed [wet] gas, or gas plant products [NGLs].) The MMS-2014 also provides the sales quantity, sales value, royalty quantity, and royalty value for each type of production. The Defendants were also required to submit Form MMS-4025. This form identifies the Indian leases by a code number and states the effective royalty rate in the particular lease. This royalty rate is then used in the MMS-2014 to calculate the royalty quantity and value each lessee owes to the expectant parties.

Relator Wright owned royalty interests in a tract of land in East Texas near the Tribe's Reservation. He had been receiving monthly gas, NGL, and condensate royalty payments for gas wells located on this tract of land for over twenty-five years. When the operator on Wright's property sold its lease interests to Comstock, Wright's monthly gas and NGL royalty payments dropped dramatically. Because of this dramatic drop in royalty payments and Wright's

extensive experience in the oil and gas industry, Wright speculated that he was being underpaid by Comstock and further deduced that other royalty owners with Comstock leases in the area, such as the Tribe, were similarly being underpaid. Wright contacted Kennard with this information. Upon further research by Kennard of Comstock's dealings in the area, Kennard found that the Indian leases might have expired. Kennard subsequently relayed this information to Wright. During this discussion both relators, drawing on their extensive oil and gas experience, figured that an operator such as Comstock would not fail to notice that the Indian leases had expired. From this information, Wright and Kennard made two conclusions: (1) Comstock knew that it was operating under an invalid or expired lease and therefore the MMS-2014 and MMS-4025 submitted for the Tribe's leases were factually incorrect; or (2) if the leases were in fact still valid, Comstock knowingly reduced the royalty quantities and valuations on the MMS-2014 and MMS-4025.

In light of these conclusions, Wright and Kennard, consulted with a number of attorneys and made the determination that Comstock had committed fraud and thus a violation of the False Claims Act (FCA) by submitting undervalued royalty MMS forms to the Secretary of the Interior, who accepted the Tribe's royalty payments. The attorneys involved in this dispute, including a man named Michael Sydow, began drafting a complaint detailing these allegations of fraud.

On October 26, 1998, Michael Sydow, Wright and Kennard's supposed attorney, filed suit against Comstock in the United States District Court for the Eastern District of Texas alleging that the Indian leases expired, or in the alternative, that Comstock underpaid the royalties (this case

is commonly referred to as "Case 265"). However, when Sydow filed the complaint, he did so as the Tribe's attorney, not as the Relators' attorney. The following day the Relators filed this action under seal in the same court with similar allegations. Shortly thereafter, the Tribe voluntarily dismissed "Case 265," only to re-file that suit a few days later in the purported Alabama and Coushatta Indian Tribal Court. While the Relators case was under seal, Comstock filed a declaratory judgment action in the United States District Court for the Eastern District of Texas seeking a declaration that the Indian leases are valid, that Comstock did not underpay royalties, and that the purported Tribal Court does not legally exist.[1]

Ordinarily, a civil case filed in federal court prior to the filing of a FCA case would trigger the public disclosure jurisdictional bar for a FCA claim. *See* 31 U.S.C. § 3730. However, the Relators' urge this Court to consider unique facts that allege serious attorney misconduct. The Relators allege that the "Case 265" complaint was "based solely and exclusively upon the investigations and labors of Relators whom Mr. Sydow had been representing in a fiduciary capacity as their attorney." (Relators Complaint ¶ 310.) In other words, the Relators have accused Sydow of stealing confidential information that was gained as the Relators attorney and exploiting this royalty information by bringing it to the Tribe's attention and filing on their behalf. The Relators further allege that the "complaint was intentionally designed and calculated to cause the dismissal of the present [FCA] action, so as to maximize Sydow's own personal profits, to the detriment of his former client Relator Wright, who had just discharged him, and to the detriment of his

[1] This case was recently remanded by the Fifth Circuit Court of Appeals with direction to determine if the Indian leases expired.

existing client, Relator Kennard, who had not discharged him." *Id.*

DISCUSSION

The False Claims Act:

The 1986 Amendments to the FCA are Congress' attempts to strike a balance between the avoidance of parasitic actions while encouraging legitimate private enforcement actions. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). In order to achieve this balance, Congress introduced a number of jurisdictional requirements a relator must demonstrate in order to pursue a *qui tam* action under 31 U.S.C. § 3730(b). The Defendants have challenged jurisdiction, thus the burden is on the relators to show, by a preponderance of the evidence, that jurisdiction exists.[2]

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[2] An initial question is that of the standard the Court should apply in considering the Defendants' motion. At its core the Defendants' motion appears to be a 12(b)(1) motion to dismiss for lack of subject matter. Where a challenge to the court's subject matter jurisdiction is based on allegations in the complaint alone, the court must accept the allegations of the complaint as true. *Holt v. United States*, 46 F.3d 1002, 1002 (10th Cir. 1995). However, "a court is required to convert a 12(b) motion to dismiss into a 12(b)(6) motion or a Rule 56 summary judgement motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Holt*, 46 F.3d at 1003; *Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000)("The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependant on the same statute which provides the substantive claims in the case.")

The Defendants have challenged this Court's subject matter jurisdiction in that they allege that the Relators' complaint is barred because: (1) There was a prior public disclosure, or (2) the Relators do not constitute an original source under the FCA definition. Because resolution of these issues requires consideration of matters outside of the pleadings, the Court must treat the motion as one for summary judgment

United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 551 (10th Cir. 1992). The Relators therefore must sustain "the burden of alleging facts essential to show jurisdiction and supporting those facts with competent proof." *Id.* (citations omitted). "Mere conclusory allegations of jurisdiction are not enough." *Id.* (quoting *Peneteco Corp. Ltd. Partnership v. Union Gas Sys. Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991)); *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (Relator must "allege in its pleading the facts essential to show jurisdiction.")

This Court begins its analysis by reviewing the pleadings to determine if the Relators have complied with the standards set forth in 31 U.S.C. § 3730(e)(4), which provides:

> (e) Certain actions barred
>
> . . .
>
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual that has direct and independent knowledge of the information on which the allegations

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as provided in Rule 56 of the Federal Rules of Civil Procedure. *See United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 (10th Cir. 1996). Therefore the motion shall be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Simms v. Oklahoma ex rel. Dept. of Mental Health & Substance Abuse Serv.*, 165 F.3d 1321, 1326 (10th Cir. 1999).

> are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

When reviewing 31 U.S.C. § 3730(e)(4), the Tenth Circuit Court of Appeals has stated,

> application of this statutory language involves a four-part inquiry: (1) whether the alleged 'public disclosure' contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made 'public' within the meaning of the False Claims Act; (3) whether the relator's complaint is 'based upon' this public disclosure; and, if so, (4) whether the realtor qualifies as an 'original source.'

United States ex rel Hafter v. Spectrum Emergency Care, 190 F.3d 1156, 1161 (10th Cir. 1999); *see also United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1544 (10th Cir. 1996). The court in *Hafter* also noted "[a] court should address the first three public disclosure issues first. Consideration of the fourth, 'original source' issue is necessary only if the court answers the first three questions in the affirmative." *Hafter*, 190 F.3d at 1161.

Public Disclosure:

As a threshold matter, file Court notes that "[u]nless the statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir. 1991). The language in § 3730(e)(4)(A) states that a *qui tam* action may be barred if the action is "based upon" the public disclosure of "allegations or transactions." The Tenth Circuit, however, has interpreted

this language to mean "the phrase 'based upon' is properly understood to mean 'supported by,'" *Precision*, 971 F.2d at 552.

On October 26, 1998, the Tribe filed suit ("Case 265") against Comstock and others in the United States Court for the Eastern District of Texas alleging that the Indian leases were invalid or, in the alternative, that Comstock underpaid royalties. (Beatty Affidavit ¶ 3). While "Case 265" was on file, the Relators filed this action in the same court alleging the invalidity and underpayment of royalties under the Indian leases. Clearly, there is a substantial similarity between the allegations. In paragraph 12 of the Relators' complaint it states:

> 12. Defendants falsely claimed to own or hold interests in valid and subsisting oil and gas leases and other agreements covering lands on the Reservation in Polk County, Texas belonging to the Tribe. In fact, all of such leases and other agreements either terminated prior to any production of oil or gas, or are void or voidable *ab initio* under controlling law.

This allegation is substantially similar to the Tribe's allegations in paragraph 15 and 16 of the "Case 265" complaint:

> 15. By presenting to the Tribe reports and tendering to the Tribe payments under the leases, and by otherwise representing to the Tribe that the Leases were in effect, defendant Union Oil, Black Stone, and Comstock have made false statements of fact, upon which the Tribe has relied, and which have

damaged the Tribe in excess off $91 million, exclusive of interest.

16. Further the Tribe is entitled to immediate possession of and control over the lands covered by said leases together with oil and gas production and/or processing equipment located on such lands or associated with wells located on such lands, because subsequent to the termination thereof, pursuant to their own terms and particularly because subsequent to August 17, 1987, such leases were not approved by the Secretary of the U.S. Department of the Interior pursuant to the Requirements of 25 U.S.C. § 81, and consequently the defendants occupy such lands in contravention of 25 U.S.C. § 177.

The factual situation giving rise to the allegations is identical in each complaint. Additionally, the language detailing the alleged fraud in each complaint only varies slightly. (*Compare also* Relators Complaint ¶¶ 13 and 14 with "Case 265" Complaint ¶¶ 17-20.) Thus, this Court finds that: (1) the Relators complaint contains allegations that were disclosed in a previously filed civil complaint; (2) the "Case 265" complaint constituted a public disclosure; and (3) the Relators complaint is "based upon" and thus "supported by" the "Case 265" complaint.[3] Consequently, this Court turns to

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[3] This Court notes the involvement and alleged misconduct by Michael Sydow. Although this misconduct appears to be a gross violation of the confidential nature of the attorney-client relationship, there is no exception under the False Claims Act to excuse a prior public disclosure due to its nefarious nature. Because there is no exception this Court can not overlook the simple fact that "Case 265" was filed in a federal court prior to the filing of this action.

the fourth prong of the *Hafter* analysis, whether the Relators qualify as an original source.

Original Source:

Pursuant to 31 U.S.C. § 3730(e)(4)(A), this Court maintains jurisdiction only if "the person bringing the action is an original source of the information." The term original source is defined as "[a]n individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). The Tenth Circuit recently elaborated on the FCA's "direct and independent" requirement for an original source in *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002). In *Stone* the court stated,

> the FCA's direct and independent knowledge requirement is properly construed to mean that the knowledge possessed by the relator must be 'marked by the absence of an intervening agency . . . [and] unmediated by anything but the relator's own labor.' . . . In other words: 'direct knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others,' while independent knowledge means that 'the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources.'

Id. at 799 (citations omitted).

In reaching its decision, the court in *Stone* contrasted the relator's allegations of fraud with the allegations made by a

different relator in *Hafter* where the court determined there was a lack of direct and independent knowledge. The court in *Stone* distinguished the complaint in *Hafter* by noting, "[w]e characterized his complaint, which merely stated that he had 'direct and independent knowledge of the information upon which this suit is based,' as stating only an 'unsupported, conclusory allegation' and ruled that it was insufficient to establish jurisdiction." *Stone*, 282 F.3d at 800 (quoting *Hafter*, 190 F.3d at 1162). The court continued "[b]ecause a 'mere assertion of knowledge, without adequate basis in fact and unsupported by competent proof is insufficient to establish jurisdiction' we held that 'equivocal statements' were inadequate to satisfy the direct and independent knowledge element for an original source." *Id.* at 800.

In contrast, the relator in *Stone* alleged through his complaint and affidavits that he had intimate knowledge regarding the pondcrete containment system which was the source of the FCA claim. The court stated:

> [H]ere review of the record convinces us that Stone has been specific and detailed in showing how he obtained, through his own efforts and not through the labors of others, direct and independent knowledge that Rockwell's design for manufacturing pondcrete blocks would result in the release of toxic waste. Stone supplied the district court with an affidavit detailing his duties and responsibilities at Rocky Flats and describing his observations there that underpinned his FCA action. Stone averred that he commenced employment with Rockwell at Rocky Flats on November 10, 1980, as a Principal Engineer in the Facilities, Engineering and Construction Division, and that he was subsequently promoted . . .. Stone averred

> that his duties at Rocky Flats included plant-wide 'trouble shooting' and reviewing designs and existing operations for safety and cost effectiveness.

Id. at 801. Stone also provided the court with affidavits detailing how he studied the defective design and had made the determination that the pondcrete process would not work which was memorialized in an engineering order which was provided to the court. *Id.* at 801. The court felt that, in light of the information provided, the relator had sufficiently provided direct and independent knowledge of the fraudulent acts to meet the jurisdictional requirements of 31 U.S.C. § 3730(e)(4)(A). *Id.* at 802.

In this case, the Defendants argue that the information provided to this Court by relators Wright and Kennard does not demonstrate "direct or independent knowledge" required under the FCA. Certainly, the affidavits supplied to the Court demonstrate more than a mere "equivocal statement" as was provided in *Hafter*, however, it does not rise to the level contemplated by the Tenth Circuit in *Stone*. Accordingly, this Court must agree with the Defendants.

Relator Kennard's affidavit begins by explaining how his education led him to discover discrepancies in Comstock's Indian leases and MMS reports. (Kennard Aff. ¶¶ 3, 4). He further explains that his allegations of fraud were based on the information he gathered at the General Land Office (GLO). (Kennard Aff. ¶¶ 9-18). While at the GLO office, Kennard found that the Indian leases had file covers that stated they had expired. With additional investigation, he also found that Comstock had failed to contest the administrative termination of these leases. (Kennard Aff. ¶¶ 12,13). These discoveries and a prior review of the MMS reports submitted to the Department of Interior led Kennard

to speculate that Comstock had produced gas plant products or natural gas liquids (NGLs) and failed to pay any NGL royalties to the tribe. (Kennard ¶ 3).

After making this discovery Kennard contacted Wright and explained the situation. Wright further confirmed Kennard's speculation of the underpayment or non-payment of royalties by explaining that he also felt his NGL royalty payments were underpaid. (Wright Aff. ¶ 12). From all the information gathered, Wright and Kennard made two conclusions: (1) Comstock was operating under expired leases and failed to make NGL royalty payments to the Tribe, or (2) if the leases were still valid the NGL royalties were underpaid. (Kennard Aff. ¶¶ 20-22 and Wright Aff. ¶ 13).

Although the Relators have compiled an enormous amount of information, the affidavits fail to demonstrate that the relators are an original source as outlined in *Stone*. In *Stone* the relator worked within the company that had made false claims to the government. *Stone*, 282 F.3d at 801. Because he worked within the company, Stone was in the unique position of being able to gather information that was not publicly available. In other words, the information Stone gathered was not derived from the labors of others. Additionally, Stone made independent deductions and conclusions based on the information he gathered. Thus the court was presented with affidavits and exhibits that demonstrated knowledge that was gained without the help of an "intervening agency" and "unmediated by anything but the relator's own labor." Quite simply, the knowledge for the basis of the fraud allegation was direct and independent from any other source.

In contrast, Relators Wright and Kennard never had any intimate knowledge of the inner-working of Comstock or the

related Defendants. They merely provided this Court a compilation of information that is a matter of public record. *See* Kennard Aff. ¶ 10 ("I called Mr. Spencer Reid, the General Counsel of the GLO whom I had also known for a long time. I asked to have someone locate and 'pull' for us all the GLO lease files covering the lands on the Alabama Coushatta Indian Reservation in Polk County, Texas.") Clearly, the Indian lease files found at the GLO are publicly accessible. The MMS reports filed by Comstock are also matters of public record. *See* Kennard Aff. ¶ 3 ("Sometime late in 1997 I studied the Mineral Revenues 1996 Report on Receipts from Federal and Indian Leases issued by the Mineral Management Service ("MMS") of the U.S. Department of the Interior ("DOI") . . . .") The Relators have merely compiled public information and because of their education and background were able to speculate that Comstock underpaid NGL royalties. In short, all the information regarding the underlying fraud was derived from the works of others. This simply can not qualify as "direct and independent knowledge" under Tenth Circuit precedent. *See Stone*, 282 F.3d at 799 ("independent knowledge means that 'the relator's knowledge *must not be derivative of the information of others*, even if the so others may qualify as original sources.") (emphasis added); *see also Hafter*, 190 F.3d at 1163 (relator did not possess direct and independent knowledge when "most of the core information contained in the [public document] came from [a third party's] independent research and investigation"); *MK-Ferguson*, 99 F.3d at 1548 (relator, an audit supervisor, did not have "direct" knowledge because the actual field work on the audit was performed by others and relator's only involvement was to take the facts and compile those into a written report, thus relator's knowledge was "secondhand" and "derivative" because "he did not discover the allegedly fraudulent practices . . . and was not an observer of the purported

fraud."); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1009-7 (10th Cir. 1996) (relator's knowledge is not "direct" when knowledge was derived from the work of auditors under his supervision); *United States ex rel. Grynberg v. Praxair, Inc.*, No. 98-D-12 at 36-37 (D.Colo. Mar. 28, 2001) ("at best, Grynberg learned of the alleged possible wrongdoing from insiders . . . and then conducted further investigation into the matter. Such secondhand information does not constitute direct and independent knowledge under the FCA . . . Grynberg's investigation, general knowledge, education, experience and expertise do not render him an 'original source.'") Furthermore, other circuits have uniformly held that a relator cannot possess "direct" knowledge when the information is gathered from other sources.[4]

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[4] *See Grayson v. Advanced Management Tech.*, 221 F.3d 580, 583 (4th Cir. 2000) (The relators, who were attorneys that represent their client in an administrative proceeding, learned of the alleged misconduct by reading the complaint filed by another party, did not have direct knowledge because they "at best verified" the other party's information, they did not "become original sources due to their 'specialized' experience as government contract lawyers"); *United States ex rel. Barth v. Ridgedale Elec. Inc.*, 44 F.3d 699, 703-04 (8th Cir. 1995) (Relator, which prior to filing the action investigated the allegations by visiting the job site, reviewing publicly-filed payroll records, and interviewed defendant's employees did not have "direct' knowledge because it was merely gathering facts and thus was a "recipient of information' and not a "direct source"); *United States ex rel. Eitel v. Reagan*, 2000 U.S. App. LEXIS 26123 at *6 (9th Cir. 2000)(relator "Although he [relator] did a considerable amount of investigative work, his information about the misuse of the [government] program came either from public sources. . . . the relators knowledge was not direct and independent because he did not discover firsthand the information underlying the allegation of fraud but rather derived it secondhand from others."); *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 361-62 (9th Cir. 1996), *cert denied*, 117 S. Ct. 361 (1997) (relators who learned of defendant's wrongdoing from an insider and who conducted an investigation to confirm the allegations, did not have "direct knowledge because "they did not see the

For the above stated reasons, Relators Wright and Kennard do not possess "direct and independent knowledge" regarding the invalid Indian leases or the underpayment of NGL royalties, therefore, they do not qualify as an "original source" under the FCA. Pursuant to 31 U.S.C. § 3730(e)(4), this Court lacks jurisdiction. Accordingly, this Court must grant Defendants' Motion to Dismiss for lack of subject matter jurisdiction over the FCA action.

THEREFORE it is hereby

ORDERED that Defendants' Motion to Dismiss is **GRANTED**.

Dated this 6th day of November, 2002

/s/
U.S. District Judge

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fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but derived it secondhand from [the insider], who had firsthand knowledge of the alleged fraud as a result of his employment [with defendant]" and relator's subsequent investigation did not provide "direct knowledge because any federal investigator could have performed the same work based upon the information in the public domain.)

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DON C. KENNARD, et al., Plaintiffs - Appellants, v. COMSTOCK RESOURCES, INC., et al. Defendants - Appellees, ---------- UNITED STATES OF AMERICA, et al., Amici Curiae.	No. 03-8012

ORDER
Filed May 4, 2004

Before **EBEL**, **McKAY**, and **LUCERO**, Circuit Judges.

Comstock Resources, Inc., and Comstock Oil & Gas, Inc.'s petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk

Appendix D

§ 3730. Civil action for false claims

* * *

(e) Certain actions barred.

* * *

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

In Re:	) **MDL Docket No. 1293**
	)
Natural Gas Royalties	) *U.S. ex rel Kennard et al*
Qui Tam Litigation	)
	) v.
	)
	) *Comstock Resources, Inc. et al.*
	) **C.A. No. 01-MD-1679**

AFFIDAVIT OF DON KENNARD

Before me, the undersigned notary public, on this day personally appeared Don Kennard who, being by me first duly sworn, on his oath stated as follows:

1. My name is Don Kennard. I reside at 1005 Congress Avenue, Suite 500, Austin, Texas. I am over the age of 21 years, of sound mind, and competent to testify to the facts stated herein, of which I have personal knowledge.

2. During 1997 and 1998 I was endeavoring to assist Harrold E. (Gene) Wright in connection with his False Claims Act ("FCA") natural gas/natural gas liquids royalty underpayment case then pending in the United States District Court for the Eastern District of Texas, Lufkin Division (the "FCA Gas/NGL Case").

3. Sometime late in 1997 I studied the Mineral Revenues 1996 Report on Receipts from Federal and Indian Leases issued by the Minerals Management Service

("MMS") of the U.S. Department of the Interior ("DOI"). I noticed that for the calendar year 1996, Indian leases in Texas had produced natural gas valued at $14,3312,551 and gas royalties of $2,781,585, but that such Indian leases in Texas had produced no "Gas Plant Products", or natural gas liquids ("NGLs"). From my experience with the oil and gas business and my service as a member of the Oil and Gas Committee of the Texas Senate, this seemed unlikely and somewhat suspicious to me. I also noticed from this MMS Report that all nine states which had Indian leases producing gas, including the three states which produced less Indian gas than Texas, had also reported various quantities of sales and royalties on "Gas Plant Products", except for Texas which reported none. This seemed to me incongruous and unlikely to be correct. Attached as Exhibit 1 is a copy of the page of the MMS Report for 1996 that aroused my suspicions.

4. From my service in the Texas Senate and as a member of the faculty at the LBJ School of Public Affairs in Austin, I knew that there were only two federally recognized and administered Indian Tribes in Texas, (1) the Tigua Indian Tribe whose reservation is near El Paso in far West Texas, and (2) the Alabama and Coushatta Indian Tribes of Texas, whose reservation is near Livingston, in Polk County in East Texas. I had visited the latter reservation as a guest for a memorable tribal ceremony. As a result of this trip, I was aware that there was considerable gas production in the general area of that reservation. Having authored the present Antiquities Law of Texas and spent considerable time in the Trans-Pecos Area of far West Texas in archeological expeditions, and on the Indian Hot Springs Ranch on the Rio Grande River southeast of El Paso in which I owned an interest, I also knew from my personal observations that there was no production of oil or gas anywhere in the vicinity of the Tigua Indian Reservation. Therefore, I concluded that

the gas production reported in the MMS Report must have been from the Alabama Coushatta Reservation in Polk County in East Texas.

5. I discussed this by telephone with Gene Wright. He told me that there was a considerable amount of gas production in and around Polk County from the deep Woodbine Formation, and that gas produced from the Woodbine Formation in this area typically was "wet" gas which usually contained very substantial quantities of NGLs.

6. I also learned that there was a NGL processing plant, known as the PGP Indian Wells Gas Processing Plant, located just outside the boundary of, and immediately adjoining, the Alabama Coushatta Indian Reservation, and that this NGL processing plant was processing the gas produced from the wells located on the Reservation, and was removing and marketing the NGLs from such Reservation gas production. This naturally heightened my suspicions about the lack of any reported NGL sales or royalties on NGLs from Texas Indian leases in the 1996 MMS Report.

7. In December of 1997, or in the early part of January, 1998, I went to the offices of the Railroad Commission of Texas (the "RRC") in Austin, and found and examined its well files on the wells located on the Alabama Coushatta Reservation. There I learned that these wells currently were operated by Comstock Resources, Inc, formerly Black Stone Oil Company ("Comstock"), and that they were completed in the Woodbine Formation at depths below 14,000 feet.

8. These files contained, as required by RRC Regulations, gas analysis test reports showing the quantities of NGLs contained in the well streams of the wells

completed on the Reservation. These reports showed the gas streams from a number of these wells contained in excess of 7 gallons of NGLs per Mcf of natural gas – more than 7 "GPM." Mr. Wright advised me that he thought the national average GPM for natural gas was about 1.5 GPM or less, and that gas containing 7 GPM, or even 3 GPM, was far too "wet" to be allowed into any typical interstate transmission pipeline without first being processed to remove the liquids. He also advised me that the NGLs contained in such 7 GPM gas were often more valuable than the residue or "dry" "pipeline" gas remaining after processing: Attached as Exhibit 2 is an example of the gas analysis reports on wells located on the Reservation which I found at the RRC.

9. Sometime either later in December of 1997 or in the early part of January of 1998, after my first visit alone to the RRC, I took with me back to the RRC Mr. Pat S. Holloway, one of Mr. Wright's attorneys in his FCA Gas/NGL case. I had known Mr. Holloway for more than 50 years, from when we had attended rival and competing high schools in Fort Worth and had had close encounters of the usual kind. I showed him the lease files on the Alabama Coushatta Indian Reservation gas wells, including the gas analysis reports showing the high levels of NGLs. He showed me that these wells apparently were being produced under leases issued by the Commissioner of the Texas General Land Office before jurisdiction of the Alabama Coushatta Indian Tribes of Texas (which had been relinquished by the federal government to the State of Texas in 1954) had been restored to the federal government in 1989. Mr. Holloway suggested that we go to the General Land Office "GLO") to inspect the royalty clauses in the leases executed by the Commissioner of the GLO as trustee for the Tribe, in order to determine the rights (now) of DOI-MMS with respect to payment of royalties on

NGLs, as well as on the gas and oil, being produced from the Reservation wells.

10. I called Mr. Spencer Reid, the General Counsel of the GLO whom I had also known for a long time. I asked him to have someone at GLO locate and "pull" for us all the GLO lease files covering lands on the Alabama Coushatta Indian Reservation in Polk County, Texas.

11. Mr. Holloway and I then went to the GLO, either on the same day as our visit to the RRC, or on the following day, to examine the gas/ngl royalty clauses in the GLO leases on the Alabama Coushatta Reservation. This was still in late December, 1997 or the early part of January of 1998. Mr. Reid showed us the lease files we had requested and furnished us an office with a large table to examine them.

12. The first thing I noticed was that the file jackets of the GLO Alabama Coushatta Indian lease files had the word "EXPIRED" stamped on the cover of the file jackets. Mr. Holloway, who said he had examined many GLO lease files over the course of many years, appeared to be very surprised. I asked Mr. Reid what this "Expired" legend meant. He said this legend was an official notation made only after the Commissioner, following an established administrative procedure within the GLO, had determined that the lease involved had in fact expired, either for lack of production at or after the expiration of the primary term, or for failure to pay delay rentals when due, or for other event of termination specified in the lease involved. Mr. Reid also said this official stamp was never placed on a lease file jacket until the lessee had been notified in writing and given an opportunity to show that the lease had not in fact expired. Attached as Exhibits 3.1 through 3.4 are copies of some of the file jackets of the GLO Alabama Coushatta Indian Reservation lease

files, showing the "EXPIRED" legend that Mr. Holloway and I saw that day.

13. We then examined the various lease files. We found, as Mr. Reid had said, copies of letters from the GLO to the various lessees involved, notifying them of the apparent expiration of the leases. These letters asked the lessees to contact the GLO as soon as possible if they disagreed. Attached as Exhibit 4 are copies of some of these letters.

14. We also examined the files for any replies to these lease expiration notice letters from the lessees, contesting the expirations of the leases. But we did not find any. I knew Mr. Holloway had been engaged in the practice of oil and gas law in Texas over a period of nearly 50 years. He said something to the effect that in all his years of practice he had never seen an instance in which an oil and gas lessee from the State of Texas had continued to produce huge amounts of Production under leases determined by the Commissioner to have expired, without contesting such official determination of lease expiration. We knew from the recent monthly production reports we had reviewed at the RRC that the wells on the Reservation currently were producing revenues somewhere in the approximate range of $100 Million or more per year.

15. Mr. Holloway said that from reviewing the files it appeared to him that the lessees here may have managed to conceal the fact of the Indian lease terminations in the confusion involved in the transfer of jurisdiction over the Reservation back to the federal government, from one small bureaucracy to another much larger and more disjointed one in which the Bureau of Indian Affairs share responsibility for federal Indian leases with the MMS and other federal

agencies. The files contained copies of the deed conveying title to the Reservation and any valid leases then in effect, from the Governor of Texas to the Secretary of DOI, dated July 25, 1989. Some of the lease termination notices were dated July 19, 1989, only six days before this transfer deed. *See* Exhibits 4.1 and 4.2. A copy of this deed (executive order) from the Governor to the Secretary dated July 25, 1989 is attached as Exhibit 5. This deed conveyed the title to the Reservation from the State, as trustee for the Tribe, "to the United States of America by and through the Secretary of the Interior, in trust for the benefit of the Alabama-Coushatta Tribe." The deed covered "oil, gas and mineral leases which are valid, subsisting and of record." But it did not describe any of the State Indian leases which the Commissioner had determined had expired for lack of production at the end of their primary terms.

16. I also noticed from this deed and the GLO lease files that this transfer of jurisdiction of the Tribe and its Reservation back to the federal government had been at least a two-year process, beginning with an Act of Congress and an Act of the Texas Legislature in 1987, and continuing after August 1, 1989 when the School Land Board had ratified the Governor's deed dated July 25, 1989 and had requested that the GLO Commissioner "and his staff take all appropriate and necessary steps to ensure the prompt and orderly transfer of such assets to the United States of America as trustee to said tribes. . ."

17. I also noticed that some of the State Indian leases had been executed by Bob Armstrong when he was Commissioner of the GLO, whom I had known since we served together in the Texas House of Representatives. Somewhat ironically, Mr. Armstrong was at the time of our visit to the GLO then the Assistant Secretary of DOI for

Land and Minerals Management, and charged with overseeing the MMS which was responsible for collecting royalties on Indian leases administered by the federal government.

18. Mr. Holloway told me that the royalty clauses in these State Indian Leases were very different from, and in certain respects much more onerous on the lessees than, the royalty clauses in the federal and Indian leases used by DOI which the MMS bureaucracy was accustomed to working with in attempting to audit and collect royalties.

19. At this juncture I recalled that, within the previous year, Bob Armstrong had told me privately in effect (though perhaps not in exactly these words) that his MMS was completely clueless when it came to auditing or collecting for NGL royalties. Based on that, I concluded that the differences in royalty clause wording which Mr. Holloway considered to be so important might not be very relevant if MMS didn't even know how to audit NGL royalties. This conclusion was fortified when I later saw an MMS audit report, written at a time when all the Reservation gas was being processed for the recovery of NGLs at the NGL plant adjoining the Reservation. This MMS audit report stated categorically that the Reservation gas had never been processed, and blessed all the royalty payments that had been made to MMS for the Tribe during the period 1990-1995.

20. Mr. Holloway and I then informed Gene. Wright what I had found at the RRC and GLO: I advised Mr. Wright that it appeared to me both that (1) NGL royalties that should have been paid to the federal government for the benefit of the Tribe had net been paid, and (2) the State Leases under which the federal government was being paid royalties for the Tribe had expired, so that the government

and the Tribe were actually entitled to be paid for 100% of all production of oil, gas and NGLs produced from the Reservation lands, instead of just the royalty percentage of such production specified in the expired leases.

21. Mr. Wright then advised us that he also was a royalty owner under some leases in East Texas operated by Comstock. He said he had compared the Comstock settlement sheets accompanying his monthly royalty checks from Comstock with other information he had about market values, including run statements and settlement sheets from other operators in counties close to Polk County, and that he had concluded that he was being underpaid for his royalty under the Comstock leases.

22. Mr. Wright told me it was the usual industry practice for companies to follow the same royalty payment practices on a state-wide basis, particularly in states such as Texas which had common purchaser statutes prohibiting lessees and purchasers of production from discriminating among royalty owners. Thus, he said his own personal royalty payments from Comstock independently corroborated my conclusion about Comstock royalty underpayments on the Reservation.

23. After Mr. Holloway had reported to us the results of his briefing of various legal issues, Mr. Wright and I decided we should jointly file as co-relators a False Claims Act qui tam suit against Comstock et al.

24. We also decided that we would invite the Tribe to join us as an additional co-relator on a 50-50 sharing basis. I knew that Mr. Tom Diamond, an attorney in El Paso, had long represented the Tigua Indian Tribe and was responsible for obtaining official government recognition of that Tribe. I

knew Tom was currently litigating with Governor Bush over the Tiguas' rights to operate a gambling casino on their reservation near El Paso, which most Texans (except for Governor Bush's conservative religious supporters) favored. I thought it likely that Tom might also represent the Alabama Coushattas, the only other officially recognized Indian tribe in Texas.

25. I called Tom and asked him if he represented the Alabama Coushattas. Tom said that he presently had a case in which he represented the Alabama Coushattas, seeking to recover from the federal government for the value of a very large amount of lands and minerals in East Texas which had been taken from the Tribe. He expressed interest in our proposal for the Alabama Coushattas to join us as co-relators in a FCA qui tam case in which his firm would join with the Verner Liipfert firm and Gene Wright's other attorneys in representing all relators. After consultation with Mr. Wright, I called Mr. Diamond again, and told him I would ask Mr. Holloway to call him. I believe this was on about January 14, 1998.

26. On about January 16, 1998, Mr. Holloway told me that, after consulting with Gene Wright and Mr. Sydow, who was then acting as lead counsel for Mr. Wright in his pending FCA Gas/NGL case and would also handle the new case, Mr. Holloway had called Tom Diamond.

27. As a result of these telephone conversations, Mr. Holloway and I met with Alan Rash, one of Tom Diamond's law partners, at his hotel room in Austin where he had come on other business. At this meeting Mr. Holloway revealed to him on a confidential basis what I had learned about the Tribe's leases and royalty payments as outlined above. Mr. Holloway also informed Mr. Rash what Gene Wright had

told us about his own personal royalty payments from Comstock.

28. As a result of this meeting, and conversations I understood Tom Diamond had with the Tribe, Alan Rash and Mr. Holloway were invited to and did attend a meeting of the Tribal Council of the Tribe held in its offices on the Reservation on the evening of Monday, January 26, 1998. This meeting was for the purpose of informing the Council on a confidential basis what I had learned about the Tribe's leases and royalty payments as outlined above, and to invite the Tribe to join in the proposed FCA qui tam suit with Gene Wright and me on a basis whereby the Tribe would be entitled to receive 50% of any relators' awards in such proposed lawsuit, and all three relators would be represented by Gene Wright's existing attorneys and the Diamond Rash firm.

29. I understand that as a result of that meeting with the Tribal Council on January 26, 1998, there then ensued a series of subsequent meeting between Mr. Rash and Mr. Sydow, Mr. Wright's lead counsel, and the other attorneys representing Mr. Wright in his FCA Gas/NGL Case, and other meetings between such lawyers, or some of them, and the Tribal Council or its members. But I did not attend any of those meetings, and so I do not personally know what was said or done at those meetings.

30. I do know that during all of this period, and until sometime in October, 1998, Mr. Sydow and his firm were acting as lead counsel for Gene Wright in his FCA Gas/NGL case. I know that because I was personally present with Mr. Wright, Mr. Holloway and others at the meeting in the Fall of 1997 with Mr. Sydow in the Houston offices of Verner, Liipfert, Bernhard, McPherson & Hand, when Mr. Sydow

agreed to accept representation in such case, and because I, along with Gene Wright, signed the Settlement Agreement with Sydow and his firm dated April 12, 1999, after Gene Wright had discharged Sydow and his firm, for cause, from further representation of him in the FCA Gas/NGL Case and this case and the other cases in which he had been representing Gene Wright and me.

31. My understanding is this discharge was precipitated by the fact that Sydow had decided to file on behalf of the Tribe the competing and conflicting lawsuit which is claimed to be "public disclosure" of the claims of Gene Wright and me in the present case, which conflicting lawsuit was filed one day before we filed the present case in the same court.

Further Affiant saith not.

/s/
DON KENNARD

SWORN AND SUBSCRIBED TO before me this 22 day of June, 2001.

/s/
NOTARY PUBLIC

EXHIBIT 1
Mineral Revenues 1996

Table 29. Calendar year 1996 sales volume, sales value, and royalties by commodity and State from Indian mineral leases

	Sales Volume	Sales Value	Royalties
Chat			
Oklahoma	239,199	262,667	71,760
Coal			
Arizona	12,184,822	274,794,525	33,226,179
Montana	4,681,254	27,284,017	2,139,868
New Mexico	9,438,892	219,211,160	27,697,824
Subtotal	26,304,968	521,289,702	63,063,871
Copper			
Arizona	46,519	20,604,368	1,690,035
Gas			
Arizona	338,685	416,783	81,493
Colorado	133,443,161	141,613,351	18,471,467
Montana	1,293,984	1,782,615	269,978
New Mexico	56,776,248	111,382,644	13,899,521
North Dakota	187,924	281,975	38,077
Oklahoma	26,054,670	47,047,589	7,897,760
Texas	6,144,900	14,312,551	2,781,585
Utah	8,823,728	13,341,919	2,146,014
Wyoming	15,426,502	15,659,653	2,672,664
Subtotal	248,489,802	345,839,080	48,258,559
Gas Lost			
New Mexico	204	260	32
Oklahoma	20,659	50,387	6,298
Subtotal	20,863	50,647	6,330

Gas Plant Products			
Arizona	102,111	37,919	4,046
Colorado	3,094,000	1,620,030	192,657
Montana	174,002	55,065	3,094
New Mexico	62,634,131	16,763,716	1,541,334
North Dakota	270,090	85,645	8,114
Oklahoma	4,244,953	1,269,162	181,122
Utah	10,812,336	3,389,558	304,859
Wyoming	421,824	175,225	7,356
Subtotal	81,753,447	23,396,320	2,242,582
Granite			
Washington	169,957	1,357,256	169,957
Gypsum			
Mexico	702,980	2,811,920	637,285

EXHIBIT 2

BLACK STONE OIL COMPANY
Alabama Coushatta No. 4

TABLE I
HYDROCARBON ANALYSIS OF SEPARATOR PRODUCTS AND CALCULATED WELL STREAM
GOR = 8749 SCF/SEPB

Component	Separator Oil	Separator Gas		Well Stream	
	MOL%	MOL %	GPM @ 14.65	MOL%	GPM @14.65
Nitrogen	0.000	0.120	0.000	0.108	0.000
Carbon Dioxide	0.000	4.920	0.000	4.440	0.000
Methane	19.190	79.090	0.000	73.250	0.000
Ethane	11.020	9.130	2.425	9.314	2.474
Propane	8.340	3.360	0.921	3.846	1.054
Iso-butane	3.370	0.800	0.261	1.051	0.342
N-butane	4.570	0.890	0.279	1.249	0.392
Iso-pentane	3.030	0.460	0.167	0.711	0.259
N-pentane	3.940	0.300	0.108	0.655	0.236
Hexanes	5.710	0.370	0.152	0.891	0.364

Heptanes Plus	40.830	0.560	0.272	4.486	3.146
	100.000	100.000	4.585	100.000	8.267

Properties of Heptanes Plus (Sep. Oil)

Degrees APR	0.7990
S.G. @ 60 F	0.7990
Mol. Wt.	178.0000

Separator Gas & Well Stream

Calculated S.G. (Air = 1.0)	0.74690	
Mol. Wt.	21.63471	29.01
B.T.U. Calc. Dry @ 14.65 and 60 Deg. F.	1181.0	

Gas-Oil Ratio

Separator Ration, SCF/SEPB	8749.00

Total Separator Oil

Degrees API	73.8000
S.G. @ 60 F	0.6892
Mol Wt.	97.3000

[Sept. 2, 1993 Received RRC of Texas OG Houston]

EXHIBIT 3.1

90-00056-4

TEXAS COMMISSION OF INDIAN AFFAIRS M-92009

COUNTY:	Polk
TRACT:	2, Alabama -Coushatta Indian Lands
PART:	Thomas Colville A-16
ACRES:	363.0
LESSEE:	Sun Operating Limited Partnership
DATE:	April 1, 1986
TERM:	Three Years

EXPIRED	BONUS:	$37,632.21
	RENTAL:	$10.00 / $3,630.00
	FILE:	

EXHIBIT 3.2

90-00057-3	TEXAS COMMISSION OF INDIAN AFFAIRS M-92010	
	COUNTY:	Polk
	TRACT:	3, Alabama -Coushatta Indian Lands
	PART:	Thomas Colville A-16
	ACRES:	363.0
	LESSEE:	Black Stone Oil Company
	DATE:	April 1, 1986
	TERM:	Three Years
EXPIRED	BONUS:	$41,951.91
	RENTAL:	$10.00 / $3,630.00
	FILE:	

EXHIBIT 3.3

90-00058-2	TEXAS COMMISSION OF INDIAN AFFAIRS M-92011	
	COUNTY:	Polk
	TRACT:	4, Alabama -Coushatta Indian Lands
	PART:	Thomas Colville A-16
	ACRES:	202.2
	LESSEE:	Black Stone Oil Company
	DATE:	April 1, 1986

	TERM:	Three Years
EXPIRED	BONUS:	$26,603.46
	RENTAL:	$10.00 / $2,022.00
	FILE:	

EXHIBIT 3.4

90-00059-1	TEXAS COMMISSION OF INDIAN AFFAIRS M-92012	
	COUNTY:	Polk
	TRACT:	5, Alabama -Coushatta Indian Lands
	PART:	Thomas Colville A-16
	ACRES:	251.8
	LESSEE:	Sun Operating Limited Partnership
	DATE:	April 1, 1986
	TERM:	Three Years
EXPIRED	BONUS:	$26,104.11
	RENTAL:	$10.00 / $2,518.00
	FILE:	

EXHIBIT 4.1

Garry Mauro
Commissioner
General Land Office

July 19, 1989

Sun Operating Limited Partnership
P.O. Box 2880
Dallas, Texas 75221-2880

RE: State Leases M-92008, M-92009, M-92012 and

M-92013; Tracts 1, 2, 5 and 6
Alabama-Coushatta Indian Lands
Polk County, Texas

Gentlemen:

Our records indicate that the primary terms of the captioned leases expired April 1, 1989. We have not received any notice of drilling operations or oil and gas production; and, therefore, the file jackets of the leases have been endorsed expired.

If you disagree with this assessment, please contact me as soon as possible.

Sincerely,

/s/
Daryl Morgan
Legal Services Division
(512) 463-5109

DM/sp

Stephen F. Austin Building
1700 North Congress Avenue
Austin, Texas 78701
(512) 463-5256

EXHIBIT 4.2

Garry Mauro
Commissioner
General Land Office

July 20, 1989

Black Stone Oil Company
500 Dallas, Suite 3210
Houston, Texas 77090

RE: State Lease M-92011
Tract 4 Alabama-Coushatta Indian Lands
Polk County, Texas

Gentlemen:

Our records indicate that the primary terms of the captioned lease expired April 1, 1989. We have not received any notice of drilling operations or oil and gas production; and, therefore, the file jacket of the lease has been endorsed expired.

If you disagree with this assessment, please contact me as soon as possible.

Sincerely,

/s/
Daryl Morgan
Legal Services Division
(512) 463-5109

DM/sp

Stephen F. Austin Building
1700 North Congress Avenue
Austin, Texas 78701
(512) 463-5256

EXHIBIT 5

THE STATE OF TEXAS
EXECUTIVE DEPARTMENT
OFFICE OF THE GOVERNOR
AUSTIN, TEXAS

JULY 25, 1989

EXECUTIVE ORDER WPC-89-13

TRANSFERRING TO THE UNITED STATES OF AMERICA BY AND THROUGH THE SECRETARY OF THE INTERIOR ALL OF THE LANDS, TOGETHER WITH IMPROVEMENTS THEREON, HELD IN TRUST BY THE STATE OF TEXAS FOR THE BENEFIT OF THE ALABAMA-COUSHATTA INDIAN TRIBE OF TEXAS

WHEREAS, the United States Congress has enacted the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (the "Act") (Public Law No. 100-89, 101 Statutes-at-Large 669, August 18, 1987, codified at 25 United States Code Sections 721 through 737), which provides for restoration of the trust relationship between the United States of America and the Alabama and Coushatta Indian Tribes of Texas (considered under the Act as one tribe and referred to solely for purposes of this Executive Order as the "Alabama-Coushatta Indian Tribe" or the "Tribe"), and provides further that the United States of America shall accept any offer from the State of Texas to convey to the United States of America by and through the Secretary of the Interior all land and improvements on that land that are held

in trust by the State of Texas for the benefit of the Alabama-Coushatta Indian Tribe and that the United States of America by and through the Secretary of the Interior shall hold such land and improvements, upon conveyance by the State of Texas, in trust for the benefit of the Tribe; and,

WHEREAS, the Texas Legislature has enacted Senate Bill No. 610 (Acts 1987, 70th Legislature, Chapter 669, Texas Revised Civil Statutes Article 5421z-2), which provides that upon the restoration of such trust relationship the Governor of Texas shall transfer by executive order to the United States of America by and through the Secretary of the Interior, as soon as possible after the effective date of the federal legislation restoring such trust relationship, all assets held in trust by the State of Texas for the benefit of the Alabama-Coushatta Indian Tribe, including all real property and buildings and improvements on such property, to be held in trust for the Tribe;

NOW, THEREFORE, know all men by these presents that I, William P. Clements, Jr., Governor of Texas, under the authority vested in me, for and in consideration of these presents, and in compliance with the directive above-cited, by these presents do hereby grant, transfer and convey to the United States of America by and through the Secretary of the Interior, in trust for the benefit of the Alabama-Coushatta Indian Tribe, all the real property, including all buildings and improvements affixed to such property, that are presently held in trust by the State of Texas for the Tribe, as the same is more fully described in Exhibit A attached hereto and incorporated herein by reference, subject to any exceptions, reservations, easements, restrictions, covenants, conditions, rights-of-way, ad oil, gas and mineral leases which are valid, subsisting and of record, provided that any omission from Exhibit A shall not limit the inclusiveness of the general

description herein set out, to have and to hold the above-described premises, together with all and singular the rights, appurtenances and privileges thereto belonging, to the United States of America by and through the Secretary of the Interior, in trust as hereinbefore set out, and to his successors and assigns forever.

FURTHER, I do hereby direct all appropriate state officers and personnel to take immediately all steps necessary to make the grant, transfer and conveyance provided for by, and to effectuate the intent of, this Executive Order.

This Executive Order shall be effective immediately and remain in full force and effect until modified, amended or rescinded by me.

Given under my hand this 25th day of July, 1989.

/s/
William P. Clements, Jr.
Governor of Texas

EXHIBIT A

To Executive Order Transferring TO THE UNITED STATES OF AMERICA BY AND THROUGH THE SECRETARY OF THE INTERIOR ALL OF THE LANDS, TOGETHER WITH IMPROVEMENTS THEREON, HELD IN TRUST BY THE STATE OF TEXAS FOR THE BENEFIT OF

THE ALABAMA-COUSHATTA INDIAN TRIBE OF TEXAS

1. That parcel of land described by metes and bounds and quitclaimed in an agreement dated February 1, 1982 and entered into between Atlantic Richfield Company and the Alabama and Coushatta Tribes of Texas, described as containing 263 acres of land, more or less, being a part of the International & Great Northern Railroad Company Survey No. 17, which agreement is recorded in Volume 406, Pages 831, et seq. of the Deed Records of Polk County, Texas.

2. That parcel of land described by metes and bounds and quitclaimed in an agreement dated February 12, 1982 and entered into between Temple-Eastex Incorporated, and the Alabama and Coushatta Tribes of Texas, described as containing 263 acres of land, more or less, being a part of the International & Great Northern Railroad Company Survey No. 17, which agreement is recorded in Volume 407, Pages 757, et seq. of the Deed Records of Polk County, Texas.

3. That parcel of land described by metes and bounds and conveyed in a deed dated September 20, 1928 from W.D. Gordon, Thos. J. Baten and Carrie A. Little, a feme sole, and V.A. Collins to the United States of America in trust for the Alabama and Coushatta Indians of Texas, being a part of the Thomas Colville League, Abstract 16, Polk County, Texas, described as containing 3,071 acres, more or less, which deed is recorded in Volume 88, beginning at page 209 of the Deed Records of Polk County, Texas.

4. That parcel of land described by metes and bounds and conveyed in a deed dated October 14, 1854 from W.R. Moore to the Tribe of Alabama Indians, being part of the

Owen M. Owens Survey in Polk County, described as containing 200 acres, more or less, and which reference is made for description of said land to the description in a patent No. 49, volume 8, and which deed is recorded in Book E at pages 341 to 342 in the records of Polk County, Texas.

5. Those two parcels of land described by metes and bounds and conveyed in a deed dated August 15, 1854, from M. A. Hardin to the Tribe of Alabama Indians, which deed is recorded in the Record Book of Deeds D-E, beginning at page 311 of Polk County, Texas; the first tract therein described as containing 413.7 acres and being a part of the Bounty Land Certificate granted to said M. A. Hardin for services in the army of the Republic of Texas; and the second tract therein described as containing 177 acres and being that part of the Charles Q. Welch headright described as unimproved land adjoining and duly west of the first tract of land described in the same deed.

6. That parcel of land described and conveyed in a deed dated November 3, 1854 from Haden H. Edwards, Administrator of the Estate of Charles Chevaillier, Deceased, to Samuel Rowe, described as three hundred and twenty (320) acres of land, being a part of the George Nelson headright situated on the waters of Big Sandy in Polk County, Texas, in which reference is made for description of said land to the patent No. 3, Volume 10 recorded in Book of Deeds D, page 213 of Polk County, Texas, and which deed is recorded in Book E, pages 431 et seq. in the records of Polk County, Texas.

7. That parcel of land described by metes and bounds and conveyed in a deed dated March 30, 1970, from W.T. Carter & Bro., a partnership organized under the laws of the State of Texas, acting by and through Thomas L. Carter, its

Managing Partner, to the State of Texas, described as containing an undivided 78.272 acres out of a certain 152.55 acres tract, and being part of the John M. Ruge Survey, which deed is recorded in volume 244, pages 6[illegible] et seq. of the Deed Records of Polk County, Texas.

8. That parcel of land described by metes and bounds and conveyed in a deed dated March 30, 1970, from Camden Timber Company, a partnership organized under the laws of the State of Texas, acting by and through Victor N. Carter, its Managing Partner, to the State of Texas, described as containing an undivided 56.678 acres out of a certain 152.55 acres tract, and being part of the John M. Ruge Survey, which deed is recorded in volume 244, pages 701 et seq. of the Deed Records of Polk County, Texas.

9. That parcel of land described by metes and bounds and conveyed in a deed dated March 30, 1970, from J.C. Hooks, Trustee, to the State of Texas, described as containing an undivided 17.6 acres out of a certain 152.55 acres tract and being part of the John M. Ruge Survey, which deed is recorded in volume 244, pages 697, et seq. of the Deed Records of Polk County, Texas.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

In Re:	)**MDL Docket No. 1293**
	)
Natural Gas Royalties	)*U.S. ex rel Kennard et al*
Qui Tam Litigation	)
	) v.
	)
	)*Comstock Resources,Inc.*
	)et al.
	) **C.A. No. 01-MD-1679**

AFFIDAVIT OF HARROLD E. (GENE) WRIGHT

1. My name is Harrold E. (Gene) Wright. I reside at 828 Colonial Drive in Tyler, Texas. I am over the age of 21 years, of sound mind, and competent to testify to the matters stated here. I have personal knowledge of these facts.

2. I am co-relator with Don Kennard in the above case (the "Comstock Case"). I am also co-relator with the State of New Mexico in the case of *U.S. ex rel. Wright et al. v. Chevron U.S.A., Inc et al*, pending in this MDL Docket No. 1293 (the "Wright Gas/NGL Case").

3. I have read carefully the affidavit of Don Kennard dated June 22, 2001, and the affidavit of Pat S. Holloway dated June 28 , 2001, which are being submitted to the Court with this affidavit. All of the facts stated in those affidavits with respect to the engagement, representation, and discharge of Mr. Michael D. Sydow and his Verner Liipfert firm are correct. In addition, I can remember at least three other

occasions on which Mr. Sydow acknowledged to me that he and his firm were representing Don Kennard and me as our attorneys in our claims relating to the oil and gas leases and royalty payments on the Alabama Coushatta Indian Reservation in Polk County, Texas.

4. One of these occasions was when Mr. Sydow came here to Tyler to attend a court hearing and/or a meeting with the U.S. Attorney in connection with the oil royalty underpayment case of *U.S. ex rel. Johnson et al. v. Shell Oil Company, et al.* (the "Oil Case"). At the time Mr. Sydow and his firm were lead counsel for me in that case. On this occasion he came by my office after the hearing or meeting. We briefly discussed the Comstock Case and he said he was working hard on it for Don Kennard and me.

5. Another occasion was when Mr. Sydow came to my office here in Tyler to attend a meeting with government investigators investigating the sealed Wright FCA Gas/NGL Case in which Mr. Sydow and his firm were also representing me as my lead counsel. During a recess or lunch break in the discussions with the government investigators about the Wright Gas/NGL Case, he told me that, in addition to working on the Wright Gas/NGL Case and the Oil Case, he had been spending a substantial amount of time working for me and Don on the other two cases he was handling for both of us, referring specifically both to the Comstock Case and the other FCA case.

6. A third occasion was at the meeting in the Verner Liipfert conference room in its Houston office mentioned in Mr. Holloway's affidavit, when I was criticizing Mr. Sydow for not doing anything to advance one of the other cases he was handling for me. Although Mr. Holloway says he does not have any specific recollection of this, I remember

distinctly one of the excuses Mr. Sydow gave me then was that he was spending so much of his time working for Don Kennard and me on the Comstock Case.

7. From all my discussions and correspondence with Mr. Sydow, I am sure that he had no facts or information about the Tribe, or the leases or royalty payments on the Reservation in Polk County, except what he had learned in confidence as my attorney in this case and the other cases in which he was representing me, or Don Kennard and me. Certainly he never in any way stated, implied or suggested to me that he had any such independent or prior knowledge.

8. I never pushed Mr. Sydow to send me a written representation agreement on the Comstock Case on which he had agreed in January of 1998 to represent me and Don Kennard. We discussed the fact that the agreement between us covering the Wright Gas/NGL Case already contained the following provision:

> "10. If investigation reveals the existence of meritorious royalty underpayment claims against other parties not named as defendants in the Gas/NGL Case or other pending False Claims Act cases, the Parties agree that Attorneys will either promptly file such actions on behalf of Client forthwith pursuant to the terms of this Agreement, or else forthwith will release to Client any rights with respect to such other actions **and will do nothing to prejudice the prosecution thereof by Client**." (emphasis added)

In view of this provision and the fact that Mr. Sydow had claimed to be working for Don and me on the Comstock Case beginning in January of 1998, I assumed no further written agreement was necessary. I already had in my files

four separate written representation agreements signed by Mr. Sydow and his law firm. I never considered the possibility he would ever say he was not representing me and Don Kennard in the Comstock Case on the grounds he had not signed a written agreement on it, then file a completing case against us, and then still claim that he was entitled to continue representing me and get paid in the other cases. But of course that is exactly what he did.

9. Mr. Sydow made a number of other very serious misrepresentations of fact to me in addition to those set out in Mr. Holloway's affidavit, and injured me in a number of different instances not dealt with in that affidavit. Before deciding to discharge Mr. Sydow, and without any suggestion or encouragement from any of my other lawyers, I went to the local office of the State Bar of Texas in the First National Bank Building here in Tyler and obtained a copy of the Texas Disciplinary Rules of Professional Conduct. I spent a full day carefully reading and studying all the rules, and all the comments under the rules, contained in Article I, which is "Client-Lawyer Relationship" and comparing them with all the things I knew Mr. Sydow had done. I concluded it was very plain, and not subject to any argument or interpretation I could foresee, that Mr. Sydow had seriously violated a number of these rules.

10. I then called the attention of my other lawyers to the specific rules and comments I considered pertinent, and asked them to read them and to give me their opinions based on the facts as they knew them to be. None of them came up with any argument based on these rules and comments to justify Mr. Sydow's actions. After that I discharged Mr. Sydow as stated in my letter dated October 16, 1998 attached to Mr. Holloway's affidavit. I had reluctantly come to the firm conclusion that Mr. Sydow was not honest or

trustworthy, and that I simply could not afford to have him and his firm represent me any longer in any matter.

11. I have held responsible positions in the industry for over 50 years, and have employed persons of every level and education grade. I think my judgment has become keen on when I am being misled. I cannot and will not accept untruthfulness from anyone I am obligated to depend on. While it is unpleasant and expensive for me to discharge a person working for me for untruthfulness, I have found over the course of the years that it is the only satisfactory way to do business.

12. In early 1998, when Don Kennard advised me what he had found at the Railroad Commission and General Land Office in Austin concerning Comstock's operations on the Alabama Coushatta Indian Reservation in East Texas, I examined my own royalty payments and settlement sheets from Comstock on mineral interests I own in East Texas. I compared the Comstock prices with my other royalty payments I had received from other companies on the same properties and other properties in East Texas, including some even nearer to the Alabama Coushatta Reservation. I concluded that Comstock was underpaying me for my gas/ngl/condensate royalties.

13. I knew from my experience in the industry, and because of the Texas Common Purchaser Statute, that oil and gas operators in Texas generally have used the same royalty pricing standards or methods on either a state-wide basis or a regional basis or area basis within the state. Therefore, I concluded that in all probability Comstock was underpaying its royalty owed to the Indians as well as to me.

14. I also knew this probability was made more certain by the fact that the royalty clauses in leases issued by the Texas General Land Office impose stricter and higher pricing obligations on lessees than are imposed by the typical industry or commercial forms of leases.

15. I also know from my experience in the industry and from constructing and managing an NGL processing plant, that when gas contains as much as 3-7 gallons of natural gas liquids per mcf, the NGLS are often, in fact in the past usually, more valuable than the residue gas itself, depending of course on market prices for gas and NGLs.

16. I also investigated and learned that Comstock Resources, Inc. had been marketing at least some of its gas production from its federal leases on the Outer Continental Shelf ("OCS") through a gas marketing subsidiary. From my experience in the industry, I knew that generally the only purpose for any producer (and especially a small independent producer like Comstock) to have a marketing subsidiary, instead of just a marketing department, is to provide a corporate entity for use as a mechanism to underpay royalty owners, and thus increase corporate profits. Therefore, I concluded that Comstock was underpaying its royalties to the federal government on its OCS leases.

Further Affiant Sayeth Not.

/s/
Harrold E. (Gene) Wright

SUBSCRIBED AND SWORN TO before me, the undersigned notary public, on this 28th day of June, 2001.

/s/
Notary Public, State of Texas

(2)

No. 04-165

Supreme Court, U.S.
FILED
SEP 7 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COMSTOCK RESOURCES, INC., *et al.*,

Petitioners,

v.

DON C. KENNARD and HARROLD E. WRIGHT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

PAT S. HOLLOWAY
4002 Spanish Oak Lane
Dripping Springs, Texas 78620
(512) 894-3398

Attorney for Respondents

189581

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court should grant certiorari to review the Tenth Circuit's fact-bound determination that Respondents had "direct and independent knowledge of the information on which the [relevant] allegations are based" and thus qualified as "original source[s]" under the False Claims Act, 31 U.S.C. § 3730(e)(4), based on the Court of Appeals' findings from the unique facts in the record of this case.

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Respondents Don Kennard ("Kennard") and Harrold E. Wright ("Wright") (collectively "Relators") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed in this case.

This case is a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729-30, on behalf of the United States against Petitioners Comstock Resources, Inc. *et al.* ("Comstock"). The allegations center around royalty underpayments by Comstock on gas and natural gas liquids ("NGL")[1] owed to the federal government as trustee for the Alabama and Coushatta Indian Tribes of Texas (the "Tribe"). As the Court of Appeals found, "Relators discovered the alleged fraud and Relators conducted the investigation." Pet. App. 13a. "This case would not exist but for Relators sniffing it out." *Id.* at 14a.

The Petition for Certiorari argues that the Tenth Circuit erred in holding that Relators qualified as an "original source" under the FCA. The Petition should be denied because it involves a classic example of a fact-bound challenge to a lower court's application of a settled legal standard. Further, the Petition rests on an inaccurate description of the Tenth Circuit's holding and an incomplete account of the record evidence in this case. The Petition's claim of a circuit conflict is a mirage that disappears upon examination of the relevant opinions.

The Petition should be denied for the further reason that this Court could not even reach the question presented unless it affirmed the Tenth Circuit on three antecedent legal

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1. Natural gas liquids ("NGL") include ethane, propane, butane, isobutene and natural gasoline.

questions under 31 U.S.C. § 3730(e)(4). Respondents can and will invoke these alternative grounds to defend the Court of Appeals' judgment that there is jurisdiction under the FCA. Accordingly, even if there were a circuit conflict over the question presented (and there is not), this case would not be an appropriate vehicle to reach it.

The Petition should be denied.

STATEMENT OF THE CASE

A. Statutory Background

This Court has traced the long history of *qui tam* actions to the 13th century. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776 (2000). Such actions were "prevalent" when the Nation was founded. *Id.* The False Claims Act ("FCA") was enacted in 1863 with the principal goal of "stopping the massive frauds perpetrated by large [private] contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). "[T]he objective of Congress [in the FCA] was broadly to protect the funds and property of the Government from fraudulent claims." *Rainwater v. United States*, 356 U.S. 590, 592 (1958).

Under the FCA, a private person (the "relator") may bring a *qui tam* civil action "in the name of the [Federal] Government," 31 U.S.C. § 3730(b)(1), against any person who, inter alia, "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." § 3729(a)(7). A relator initiating the FCA action must deliver a copy of the complaint, and any supporting evidence, to the government, § 3730(b)(2), which

then has 60 days to intervene in the action. §§ 3730(b)(2), (4). If the government does so, it assumes primary responsibility for prosecuting the action, § 3730(c)(1), although the relator may continue to participate in the litigation. § 3730(c)(2). If the government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action. § 3730(b)(4).

The defendant may be held liable for up to treble damages and a civil penalty of not less than $5,000 and not more than $10,000 per claim. § 3729(a). The relator receives a share of any proceeds from the action, plus attorneys' fees and costs. §§ 3730(d)(1)-(2).

In 1986, Congress strengthened the FCA's remedy against fraud. In particular, the 1986 amendments permit *qui tam* suits based on information already in the government's possession, except where the suit is based on information that has been publicly disclosed and is not brought by an "original source" of the information. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). Section 3730(e)(4)(A) provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Section 3730(e)(4)(B) defines original source as "an individual that has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

B. Statement of Facts — Respondents' "Direct and Independent Knowledge"

The sole issue presented by the Petition is whether Relators have "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4). The undisputed record facts demonstrate that Relators meet that standard. Because the Petition omits many of these facts, it is important to canvass them in some detail.

Relators Wright and Kennard have decades of "direct and independent" personal knowledge of gas producers' royalty payment practices. Kennard is a former member of the Texas Senate and its Oil and Gas Committee, and of the faculty of the LBJ School of Pubic Affairs. Pet. App. 38a. During 1997 and 1998, Kennard was assisting Wright, who was the relator in another FCA gas and NGL royalty underpayment action involving both federal and Indian oil and gas leases. *Id.* at 37a.

Wright has been engaged in the oil and gas business for 57 years. Pet. App. 66a. He started as a roustabout on wells in 1947. He became a registered professional engineer, and the Vice-President of Operations for an independent oil and gas company in charge of both NGL plant operations and landowner royalty payments. Later he became a successful independent oil and gas operator on his own behalf, and

discovered several significant gas fields. Wright is a former President and Chairman of the Board of the Texas Independent Producers and Royalty Owners' Association, a former member of the Executive Committee of the Independent Producers' Association of America, and is the only independent oil and operator ever to be chosen by the nation's major oil and gas companies as Chairman of their Natural Gas Supply Association, a national trade association and the gas "sister" to the American Petroleum Institute that represents the major companies as oil producers/refiners/ marketers. For more than 50 years (since August 1, 1953), Wright has owned producing oil and gas royalty interests located in Texas, New Mexico, Wyoming, Colorado, South Dakota, Oklahoma and Louisiana under leases operated by major oil companies and independent operators, including Comstock.

Kennard noticed that in the 1996 annual report of federal and Indian royalty receipts by the Minerals Management Service ("MMS") of the Department of the Interior ("DOI"), Indian leases in Texas had produced natural gas valued at $14,312,551 and Indian gas royalties of $2,781,585, but that such Indian leases in Texas had produced no "Gas Plant Products" or NGL. He also noticed from this report that all nine states that had Indian leases producing gas, including the three states that produced less Indian gas than Texas, also had reported various quantities of sales and royalties on Gas Plant Products, except for Texas. There were no Indian Gas Plant Products (NGL) reported for Texas — not even a single gallon or a quarter's worth — on Indian gas production valued at $14,312,551.

These Indian gas and NGL production and royalty figures were reported by states but not by tribes. But Kennard knew,

from his service in the Texas Senate and as a faculty member of the LBJ School of Public Affairs, that there were only two federally recognized Indian tribes in Texas, the Tigua Indian Tribe whose reservation was near El Paso in far West Texas, and the Alabama and Coushatta Indian Tribes of Texas whose reservation was in East Texas near Livingston in Polk County. Kennard had visited the latter reservation as a guest at a tribal ceremony. From that trip he was aware there was considerable gas production in the general area of the Alabama and Coushatta Reservation.

Having authored the present Antiquities Law of Texas and spent considerable time in the Trans-Pecos Area of West Texas on archeological expeditions, and on the Indian Hot Springs Ranch on the Rio Grande River southeast of El Paso in which he owned an interest, Kennard knew from personal observation that there was no production of oil or gas anywhere near the Tigua Reservation near El Paso. Therefore, Kennard concluded that the Indian gas production reported in the MMS report must have come from the Alabama and Coushatta Indian Reservation (the "Reservation") in Polk County in East Texas.

He discussed this with Wright. Wright told Kennard that there was a considerable amount of gas production in and around Polk County from the deep Woodbine Formation, and that gas produced from this formation typically was "wet" gas that usually contained very substantial quantities of NGL. Kennard learned that there was a NGL processing plant, known as the Indian Wells Gas Processing Plant, located just outside the boundary of, and immediately adjoining, the Reservation. Kennard also learned that the Indian Wells plant was processing the gas produced from the wells located on the Reservation and was removing and marketing the NGL from such Reservation gas production.

Kennard went to the offices of the Railroad Commission of Texas ("RRC") in Austin that regulates the Texas oil and gas industry. There he found and examined the RRC well files on the wells located on the Reservation. From them he learned that these wells were operated by Comstock, and that they were completed in the Woodbine Formation at depths below 14,000 feet.

The RRC well files contained required gas analyses reports on the wells. These reports showed the gas stream from a number of these Comstock-operated wells on the Reservation contained in excess of 7 gallons of NGL per Mcf ("GPM") of natural gas. Wright advised Kennard he believed the national average GPM for natural gas was about 1.5 GPM or less, and that gas containing 7 GPM, or even 3 GPM, was far too "wet" to be allowed into any typical interstate transmission line without first being processed to remove the liquids.

Wright also advised Kennard that the NGLs contained in such 7 GPM gas were often more valuable than the residue or "dry" "pipeline" gas remaining after processing. This was an indicator that Comstock was defrauding the Government, as trustee for the Tribe, of more than $2 million per year in NGL royalty underpayments, based on its reported gas royalties.

When Kennard told Wright what he had found at the RRC, Wright re-examined his own personal royalty payments and settlement sheets. Wright owned royalty interests in a tract of land in East Texas where the Reservation is located. He had been receiving monthly gas/NGL/condensate royalty payments on the gas wells on this tract for more than 25 years. When the operator of the lease on Wright's property

sold its lease interest to Comstock early in 1996, Wright's royalty payments from Comstock, the new lease operator, had immediately dropped dramatically below the royalty payments that had been made to him over a long period of time by the previous operator. Pet. App. 12a, 45a, 65a.

Wright also compared his recent Comstock royalty prices with his other royalty payments from other companies on other properties he owned in East Texas, including some even nearer to the Reservation. From all these personal royalty payment records, he concluded that Comstock was underpaying him on his personal royalty interests. Pet. App. 66a.

Wright stated in an affidavit:

> I knew from my experience in the industry, and because of the Texas Common Purchaser Statute, that oil and gas operators in Texas generally have used the same royalty pricing standards or methods on either a state-wide basis or a regional basis or area basis within the state. Therefore, I concluded that in all probability Comstock was underpaying its royalty owed to the Indians as well as to me.

Pet. App. 66a. He "also knew this probability was made more certain by the fact that the royalty clauses in leases issued by the Texas General Land Office impose stricter and higher pricing obligations on lessees than are imposed by the typical industry or commercial forms of leases." Pet. App. 67a.

Subsequent independent research based on Comstock's gas production tax reports to the Texas Comptroller of Public

Accounts on the Reservation wells, Pet. App. 49a-61a, confirmed Wright's conclusions that Comstock had been grossly underpaying the royalties owed to the Tribe. While the Tribe's General Land Office form leases required Comstock to pay gas royalties based on the "highest" gas prices in the area, Comstock consistently had reported the *lowest* gas prices in the area — and had paid **no royalties** on the even more valuable NGL production as required by the terms of the leases.

On a subsequent trip to the RRC, Kennard took with him one of Wright's lawyers, Pat S. Holloway, whom Kennard also had known "for more than 50 years, from when we had attended rival and competing high schools in Ft. Worth and had had close encounters of the usual kind." Pet. App. 40a. Holloway showed Kennard that the Comstock wells on the Reservation were apparently being produced under leases issued by the Texas General Land Office ("GLO") before jurisdiction of the Tribe, relinquished by the federal government to Texas in 1954, had been restored to the federal government in 1989. He suggested a visit to the GLO to inspect the royalty clauses in the GLO leases to determine the rights (now) of DOI/MMS with respect to royalties on NGL produced from the Comstock wells. Kennard called the General Counsel of the GLO, whom he also had "known for a long time," and asked him to "pull" the lease files on the Reservation.

When Kennard and Holloway arrived at the GLO, the General Counsel had the Tribe's old lease files laid out on a large table. The first thing Kennard noticed was that the file jackets on the Tribe's lease files had the word "EXPIRED" stamped on the covers. He asked the General Counsel what this meant. The General Counsel explained this legend was

an official notation made only after the Commissioner, following an established administrative procedure within the GLO, had determined that the lease involved had in fact expired, either for lack of production at or after the expiration of the primary term, or for failure to pay delay rentals when due, or for other event of termination specified in the lease. This fact was significant because, under well-settled law, if an oil and gas lease has expired or is invalid, the lessee must account to the landowner for "all the resources extracted" by it from the land, "rather than just the royalties specified" in the expired or invalid lease. *See United States v. State of Wyoming,* 331 U.S. 440, 458 (1947); *Guffey v. Smith,* 237 U.S. 101, 118-19 (1915) (citing *Bender v. Brooks,* 103 Tex. 329, 127 S.W. 168 (1910)); *Benson Mining Co. v. Alta Mining Co.,* 145 U.S. 428, 434 (1892).

The GLO General Counsel explained that the official "EXPIRED" stamp was never placed on a lease file jacket until the lessee had been notified in writing and given an opportunity to show the lease had not in fact expired. Upon examination of the files themselves, Kennard found copies of the written notices to the lessees involved, including Comstock's corporate predecessor in interest before merger, notifying them of the lease expirations and asking to be contacted if the lessees' disagreed. But further examination of the lease files showed that the lessees had not replied or contested the lease expirations. Holloway informed Kennard that in the practice of oil and gas law in Texas over a period of nearly 50 years, he had never seen an instance in which an oil and gas lessee from the State of Texas had continued to produce huge amounts of production under leases determined by the Commissioner to have expired, without contesting such official government determination of lease expiration.

Kennard also noticed that some of the Tribe's leases had been executed by Bob Armstrong when he was Commissioner of the GLO. Kennard had known Armstrong since when they had served in the Texas House of Representatives together. At the time of this visit to the GLO, Armstrong was Assistant Secretary of the United States Department of the Interior for Land and Minerals Management, and in charge of its Minerals Management Service that was currently responsible for collecting and auditing the royalties on the Reservation and transmitting the funds to the Tribe.

Holloway explained to Kennard that the royalty clauses in the GLO leases were very different from, and in certain respects more onerous on the lessees than the royalty clauses used by DOI/MMS which the MMS bureaucracy was accustomed to working with in attempting to audit and collect royalties. At this juncture Kennard recalled that within the previous year Armstrong had told him privately in effect that "his MMS was completely clueless when it came to auditing or collecting NGL royalties." Based on that, Kennard "concluded that the differences in royalty wording Mr. Holloway considered to be so important might not be very relevant if MMS didn't even know how to audit NGL royalties."

> This conclusion was fortified when I later saw an MMS audit, written at a time when all the Reservation gas was being processed for recovery of NGLs at the NGL plant adjoining the Reservation. This MMS audit report stated categorically that the Reservation gas had never been processed, and blessed all the royalty payments that had been made to MMS for the

> Tribe during the period 1990-1995 [even though not at the "highest" prices as required by the GLO leases].

Pet. App. 44a.

Based on the foregoing information, and after ascertaining that the federal government had not later issued new leases on most of the tracts covered by the expired state GLO leases on which Comstock had wells and was producing gas/NGL, Relators decided to file this FCA case.

C. Proceedings in This Case

Wright and Kennard disclosed what they had found out to the Tribe, and invited it to join with them as co-relators in this FCA action on a 50-50 basis, so that the Tribe would share 50% of the statutory relator's award — in addition to 100% of the remainder of the recovery the Tribe would be entitled to as sole beneficiary of the FCA claim. Pet. App. 45a, 47a. .

Relators also conveyed all the information they had obtained to Mr. Michael D. Sydow, a Houston attorney who then was lead trial counsel for Wright in his pending FCA gas/NGL royalty underpayment action, and was representing both Wright and Kennard in another case. Sydow agreed to file this case for them, and for 6 months told them repeatedly he was working on it for them. Pet. App. 62a-65a. In the meantime, however, he obtained a more favorable representation agreement from the Tribe and prepared a complaint on the Tribe's behalf. Sydow's complaint in the Tribe's case was simply copied from a draft of the FCA

complaint for the present case that Holloway had submitted to Sydow for filing on behalf of Kennard and Wright. Pet. App. 2a.

On October 21, 1998, Relators Kennard and Wright discharged Sydow and filed with the government their FCA statutory Disclosure Statement, including a copy of their unfiled FCA complaint in this case, as required by the FCA. Pet. App. 2a. On October 26, 1998, Sydow filed suit on behalf of the Tribe rather than as Relators' attorney. The next day, Relators filed their own suit.

The district court dismissed Relators' case for lack of jurisdiction on the ground that the filing of the Sydow Complaint constituted a "public disclosure" and that Relators were therefore required to show that they were "an original source." The district court noted "the involvement and alleged misconduct by Michael Sydow. Although this misconduct appears to be a gross violation of the confidential nature of the attorney-client relationship, there is no exception under the False Claims Act to excuse a prior public disclosure due to its nefarious nature." Pet. App. 26a n.3. The district court also opined that "the Relators have compiled an enormous amount of information," *id.* at 30a, but it held that they did not possess "direct and independent knowledge" sufficient to meet the "original source" test.

D. The Court of Appeals Decision

The Tenth Circuit unanimously reversed. Pet. App. 1a. The Court of Appeals held that the Sydow Complaint constituted a prior "public disclosure" but determined that Relators qualified as "an original source" under

31 U.S.C. § 3730(e)(4)(B). Accordingly, the court concluded that there was jurisdiction over Relators' claim pursuant to the FCA.

The Tenth Circuit found that Relators "conducted their own investigation and crafted their own claim of fraud on the government." Pet. App. 12a. "Relator Wright did not refer to, or examine, or rely on any public records." *Id.* "Relator Kennard did examine public records in the course of his independent investigation. . . ." *Id.* at 12a-13a. However, "[i]t is important to note that none of the public documents disclosed the alleged fraud." *Id.* at 13a-14a. "It was only through independent investigation, deduction and effort that Relators discovered the alleged fraud." *Id.* at 14a. "Relators were not just assemblers of information. This case would not exist but for Relators sniffing it out. Through discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source." *Id.*

The Tenth Circuit denied the petition for rehearing without published comment or dissent. Pet. App. 34a-35a.

REASONS FOR DENYING THE PETITION

Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The Petition is a textbook example of an attempt to challenge a lower court's fact-bound application of a settled legal rule. Further, the question presented relies on Comstock's version of the facts. But Comstock's description of the record in this case is not accurate. The question purportedly framed by Comstock is not in fact actually presented by this case.

The "original source" standard is a heavily fact-bound inquiry, and the factual nature of the test makes certiorari inappropriate in this case. As the Tenth Circuit explained, "[i]t is the character of the relator's discovery and investigation that controls this inquiry." Pet. App. 10a. "There must be some consideration as to the availability of the information and the amount of labor and deduction required to construct the claim." *Id.* at 13a.

Every case will turn on its own facts and circumstances. Accordingly, there is no circuit conflict. Even if there were, this case would not be an appropriate vehicle to resolve it. This Court could not reach the question presented in this case because Respondents can and will invoke three antecedent issues as alternative grounds to defend the Court of Appeals' judgment that there is jurisdiction under the FCA. The Petition should be denied.

A. The Petition Rests on a Distortion of the Court of Appeals' Decision and the Factual Record in this Case.

The Petition should be denied because the question framed by Comstock is not actually presented by this case. As discussed extensively in the Statement of the Facts, Relators Kennard and Wright possessed extensive personal and firsthand knowledge of the information on which the allegations in this case were based.

The Petition is premised on misstatements of the record and of what the Tenth Circuit actually held. For example, Comstock insists that Relators "gathered what little information they had only from an examination of federal government reports and other public documents," Pet. 2, and

describes the Tenth Circuit as holding that a relator "who relied exclusively on public documents and speculation therefrom, may satisfy direct knowledge requirement. . . ." Pet. 11. But Comstock fails to address the relevant facts of this case. In fact, the Tenth Circuit opined that "*Relator Wright did not refer to, or examine, or rely on any public records*." Pet. App. 12a (emphasis added). The record is undisputed that Wright examined and relied upon only his own personal royalty payments and statements from Comstock and other oil companies. All that information was private and not available to the public or any third party. By itself, Wright's exclusive reliance on exclusively private documents provides a reason to deny the Petition.

Nor does Comstock accurately describe the efforts of Relator Kennard. Although Mr. Kennard consulted public documents at the Railroad Commission of Texas and the Texas General Land Office, the Tenth Circuit found that those documents were "relatively obscure." *Id.* at 13a. Further, "Mr. Kennard did not merely compile statistics; he did his own research and investigation." *Id.* "He did not rely on a Government report dealing with the allegations and transactions on which the current *qui tam* action is based because no such document exists." *Id.* "*It is important to note that none of the public documents disclosed the alleged fraud*." *Id.* at 13a-14a (emphasis added). That is, Kennard was able to derive an inference of fraud only by (1) integrating information from numerous sources; (2) combining it with the *absence* of certain documents (such as the absence of renewal leases by the Texas General Land Office or the federal Bureau of Land Management); and (3) analyzing it according to his extensive experience and personal knowledge. It bears emphasis that, prior to Relators, no one in state or federal government or the Tribe had discovered

Comstock's fraud in the 15 years since the first well on the Reservation was completed in 1983 or since the first state lease expired in 1982.

The Tenth Circuit's opinion was much more nuanced and careful than Comstock admits. The Court of Appeals rejected Comstock's factual assertion (repeated in its Petition for Certiorari) that "Relators merely conducted background research and relied on their own expertise to speculate that Comstock had defrauded the Government." Pet. App. 9a. Instead, the Tenth Circuit found that "[i]t was only through independent investigation, deduction and effort that Relators discovered the alleged fraud." *Id.* at 14a. "Relators were not just assemblers of information. This case would not exist but for Relators sniffing it out." *Id.* The Court of Appeals explained that it would not "adopt any bright-line rule disqualifying a relator as an original source when the relator examines public records" because "a complete and thorough investigation of a fraud on the Government will likely necessarily involve some review of contracts, documents, or other information in the public domain." *Id.* at 10a.

Comstock's efforts to pigeonhole and caricature the Tenth Circuit's decision do not justify certiorari. Comstock mislabels the Tenth Circuit's rationale as "a 'sweat of the brow'" approach, Pet. 10, but *the Tenth Circuit never used that phrase in its opinion.* Comstock asserts that the Tenth Circuit allowed the "original source" standard to be met "based solely on speculation and inference drawn from public sources. . . ." Pet. 12. In fact, the Tenth Circuit opined that "[a] mere compilation of documents or reports already in the public domain will *not* allow a relator to qualify as an original source." Pet. App. 10a (emphasis added).

Comstock asserts that "Kennard had no personal knowledge of whether those Indian leases had in fact expired." Pet. 6. This is true only in the same sense that Comstock has no personal knowledge of whether Kennard is in fact "an original source." Kennard himself read the unpublished, dead lease files, which revealed that the Indian leases had in fact expired. His knowledge was a product of "direct and independent" *personal* observation.[2]

In short, because the Petition rests on an inaccurate description of the record and the Tenth Circuit's decision, the purported "Question Presented" is not *actually* presented. The factual nature of the "original source" inquiry makes certiorari inappropriate in this case. The Petition should be denied.

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2. Illustrative of the liberties taken by Comstock with respect to the record is Pet. 28 n.7, which states: "Kennard ignored the fact that . . . the MMS Reports from 1997-1999 showed that NGL royalties were paid to the Tribe for those subsequent years." But according to the 1997 MMS report, NGL royalties were paid to the Tribe in 1997 on the basis of **less than 1 GPM** (.852597 GPM), whereas the gas analysis report on one well on the Reservation showed the gas contained **8.267 GPM**, or more than **ten times** as much NGL as was reported to MMS; and the gas analyses reports "showed that a number of these wells contained in excess of 7 gallons of NGLs per Mcf of natural gas – **more than 7 'GPM'" – or more than 8.2 times the NGL royalties actually paid**. Appendix A to Opening Brief of Appellants Kennard and Wright at 425-427 and accompanying exhibits (10th Cir. filed March 24, 2003). Thus, the evidence shows that Petitioners may have paid only 1/10th or 1/8th of the NGL royalties actually due in 1997 and **none** in 1996 when the plant **was** in operation.

B. There Is No Circuit Conflict.

Comstock contrives to concoct a circuit conflict by focusing on isolated snippets from FCA cases. But there is no circuit conflict. In no two *qui tam* cases will either the amount, character or source of the information possessed by the relator be the same. In part this is because the "original source" test is highly fact-specific. In part it is simply because in no two cases of fraud on the government will the whistleblower have discovered the particular fraud in exactly the same way. The fact that whistleblowers in other FCA *qui tam* cases have acquired different kinds of information in different kinds of ways does not establish a circuit conflict. The Tenth Circuit has already analyzed the bulk of the cases cited by Comstock and explained why there is no inconsistency. Pet. App. 12a-14a. Comstock's statement that there is "confusion" warranting this Court's review rests on a treatise written by an attorney who represents Comstock's own amici, and the statement is therefore entirely self-serving. *See* Pet. 27 (citing John T. Boese, *Civil False Claims and Qui Tam Actions* (2d ed. 2004)).

Comstock cites *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) (Pet. 19), but that case supports Relators. The D.C. Circuit opined that, because

> the pay vouchers and phone records did not themselves suffice to indicate fraud, Springfield had to have bridged the gap by its own efforts and experience. . . . Springfield started with innocuous public information; it completed the equation with information independent of any

> preexisting public disclosure. As such, Springfield is an original source. . . .

Id. at 657.

Comstock cites *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1045 (2004) (Pet. 16), but there the relator made no investigation of his own and learned the relevant information from a deposition in a related case. By contrast, as the Tenth Circuit found, "Relators' claim did not derive from a third party's research and investigation. Relators discovered the alleged fraud and Relators conducted the investigation." Pet. App. 13a.

Comstock cites *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1988) (Pet. 16-17), which involved a company that falsified wage and hourly reports submitted to the government. The court held that the local union and its business representative were not "original sources" because they obtained their information from discussions with former employees from the project, who were fully aware of the fraud. "[A] person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source under the Act." *Id.* at 703. By contrast, Relators in this case performed their own investigation directly; they did not learn of the fraud second-hand from any individual who was already fully aware of it. Indeed, prior to Relators' efforts, no such person existed: the fraud had occurred unnoticed for 15 years.

Comstock cites *United States v. Alcan Electrical and Engineering, Inc.*, 197 F.3d 1014 (9th Cir. 1999) (Pet. 17), but there the Ninth Circuit opined, "'most everyone in Local 1547 knew of the [false employee wage certification] program' and 'all plaintiff added by way of his investigation was a legal name to describe the alleged circle of facts.'" *Id.* at 1021. By comparison, Relators did not merely add a label to the discoveries of others. Their undisputed affidavits (Pet. App. 37a-68a) show very specifically that they learned of the information first-hand.

Comstock cites *United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir. 1996) (Pet. 17), which involved two relators who were told of the fraud by a third party. *See* 84 F.3d at 360 ("During the week of January 13, 1992, relators Rodney Kodman and William Devlin were informed of the alleged fraud by William Coley, an SSD employee who had participated in the fraud by falsifying records."). By contrast, Relators here discovered the fraud, obtained their knowledge through their own labor, and did not derive it second-hand.

Comstock cites *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999) (Pet. 17, 19, 20), where a relator claimed to have engaged in an independent investigation of Medicare billing fraud but "could not recall the name of any medicare patient who was allegedly charged for unnecessary medical services." *Id.* at 526. Here, by contrast, Relators' investigation was amply detailed in their affidavits. Further, Dr. Aflatooni's supposed investigation showed merely that defendant had "deficient auditing procedures," which "is not evidence of fraud." *Id.* By comparison, Relators here uncovered evidence of actual fraud.

Comstock cites *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997) (Pet. 18), but the Tenth Circuit properly distinguished *Findley*:

> Unlike the relator in *Findley,* Relators in our case did not merely attach a legal label to a fraud already noticed in the public domain. While "relator Findley's complaint merely echoe[d] publicly disclosed, allegedly fraudulent transactions," Relators in our case conducted their own investigation and crafted their own claim of the fraud on the Government.

Pet. App. 12a.

Comstock cites *United States ex rel. Kreindler v. United Technologies Corporation,* 985 F.2d 1148 (2nd Cir. 1993) (Pet. 18), where the defendant manufacturer had publicly disclosed the defects to the FCA plaintiff law firm in a previous wrongful death action. The Second Circuit ruled that the information received by the law firm from the manufacturer's own public disclosure was second-hand. By contrast, Comstock did not publicly disclose its royalty underpayments, and "Relators did not merely label or translate an already publicly disclosed fraud." Pet. App. 12a. Nor in the instant case would the information "have been equally available to strangers . . . had they chosen to look for it." 985 F.2d at 1158. "It was only through independent investigation, deduction and effort that Relators discovered the alleged fraud." Pet. App. 14a. During 15 years of production, no one in state or federal government or the Tribe had discovered Comstock's underpayment of royalties. Wright's personal and private royalty records were not available to any stranger who chose to look at them.

In *Kreindler*, the Second Circuit opined that an "original source," in addition to being an original source of the information on which the allegations are based, "also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." 985 F.2d at 1159. That additional requirement, which is not supported by the statute, is in any event irrelevant here. The Tenth Circuit did not address or decide this issue in the present case, and the issue is not presented under the facts here. Comstock made no public disclosure. Wright and Kennard undeniably were the only "source" for the Tribe and Sydow. Thus, Relators would qualify as an "original source" even under the Second Circuit's reasoning because they were the source of the public disclosure in the Tribe's complaint.

C. The Tenth Circuit's Decision Is Demonstrably Correct.

The Court of Appeals' decision is entirely consistent with the text, structure, and history of the statute. Indeed, even Comstock ultimately acknowledges that "an original source need not always be a classic 'insider,'" and "[i]t is possible to gain firsthand knowledge by investigation." Pet. 25, 26 n.6. Respondents did so.

Further, Comstock appears to acknowledge that the FCA's "original source" standard would be satisfied where the defendant commits fraud in the processing of a relator's own claim to benefits. *See* Pet. 21 n.5 (relator had "firsthand knowledge" of the defendant's fraud "because he observed the fraudulent handling of his *own* benefit claims") (emphasis in original). Of course, this is exactly the situation of Relator Wright, who noticed that his own stream of royalties dropped dramatically after Comstock took over the lease on one of his properties. Pet. App. 12a.

These areas of common ground between Comstock and the Tenth Circuit simply underscore the fact-bound nature of the "original source" test and the reasons that certiorari is inappropriate in this case. To the extent that Comstock seeks to argue that the "direct knowledge" test can be satisfied *only* by first-hand observation of or participation in the defendant's fraud, Pet. 22-27, it bears repeating that such a standard would be satisfied in this case. *See* Statement of the Facts and Part A, *supra*. Comstock omits pertinent evidence demonstrating that, before filing this action, Relators reviewed Comstock MMS-2014 Reports as filed by Comstock with the government containing Comstock's false statements. Appellants' App. in C.A. at 428. The actual commission of the fraud alleged by Relators was made in the false statements of values and quantities of royalty and production for each Indian lease contained in the required monthly reports to MMS of such amounts and values for each such lease on Form MMS-2014. These sworn monthly MMS-2014 Reports of the sales quantities, sales values, royalty quantities and royalty values are the actual documents by which the fraud on the government is committed in any FCA royalty underpayment action. Even under Comstock's proposed legal standard, therefore, Relators saw the fraud "with their own eyes." This case does not present an appropriate vehicle to decide the question presented.

In any event, Comstock's argument has no legal support. The FCA does not require that a relator be a direct observer of or a participant in the fraud. Instead, Section 3730(e)(4)(B) refers to direct knowledge of "the information *on which the allegations are based.*" (emphasis added). The statute does not require direct knowledge of the *defendant's fraudulent conduct*. There can be little question that Relators had direct and independent knowledge of the information that formed

the basis of their complaint. Comstock's argument cannot be squared with the statutory text.

Indeed, in many FCA cases it would make little sense to require direct knowledge of the defendant's "fraudulent conduct." Under 31 U.S.C. § 3729(a)(1)-(7), the fraud is committed by the act of "presenting," "making," "using" or "delivering" the false claim, certificate, receipt, statement or record to the government. The actual signing and transmission to the government of the false document typically is not witnessed by anyone (or at most by a clerical employee without knowledge of its contents) — just as typically there are no witnesses to the actual writing, signing and delivery of briefs to the Court who have knowledge both of their contents and any false statements contained in them. Accordingly, Comstock's proposed construction is contrary to common sense.

Comstock's interpretation is also inconsistent with Congress' purpose in the 1986 amendments to the FCA. "The basic purpose of the 1986 amendments was to make the FCA a 'more useful tool against fraud in modern times.'" *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. Rep. No. 99-345, at 2 (1986)). "Because Congress was concerned about pervasive fraud in 'all Government programs,' it allowed private parties to sue even based on information already in the Government's possession, increased the Government's measure of recovery; and enhanced the incentives for relators to bring suit." *Id.* (quoting S. Rep. No. 345, at 2).

Comstock's construction would run counter to this important purpose. As the Tenth Circuit found, investigations of fraud on the government will frequently entail a review

of the publicly available government contracts out of which the fraud claim arises. Pet. App. 13a. Yet under Comstock's proposed approach, examination of such records would serve to disqualify *qui tam* relators. Such disqualification would defeat the purpose of the 1986 amendments, and it would encourage relators to file qui tam actions without conducting a full investigation of the relevant public records. Such a perverse incentive is hardly calculated to ensure that relators bring meritorious litigation against defendants guilty of defrauding the government.

Thus, there is no truth to Comstock's exaggerated claim that the Tenth Circuit's decision will "vastly expand" the FCA and lead to "parasitic" lawsuits. Pet. 11, 28. To the contrary, it is Comstock's construction that would frustrate congressional intent. Here, the "parasitic" lawsuit was Sydow's complaint, not the qui tam action of Relators who discovered the fraud.

D. This Case Is Not An Appropriate Vehicle To Resolve The Question Presented.

Even if there were a reason to review the question presented, this case would not be an appropriate vehicle to consider it. Comstock has sought review of the Tenth Circuit's decision with respect to the "original source" issue, which is the fourth (and last) jurisdictional requirement of 31 U.S.C. § 3730(e)(4). As the Tenth Circuit explained, a court should not even consider the "original source" question until it has determined (1) whether the alleged "public disclosure" contains allegations or transactions from one of the sources listed in § 3730(e)(4)(A), such as a criminal, civil, or administrative hearing; (2) whether the alleged disclosure has been made "public" within the meaning of the False

Claims Act; (3) and whether the relator's complaint is "based upon" this public disclosure. "A court should address the first three public disclosure issues first. Consideration of the fourth, 'original source' is necessary only if the court answers the first three questions in the alternative." Pet. App. 4a.

All three antecedent issues were extensively litigated in the courts below. For example, Relators argued that, where they filed their disclosure statement with the government *before* Sydow filed his complaint on behalf of the Tribe, there was no *prior* public disclosure as contemplated by the FCA; that no "public disclosure" occurred on October 26, 1998, when the Sydow complaint was disclosed only to a single government filing clerk; and that Relators' complaint was not "based upon" the Sydow complaint because the Sydow complaint was in fact based solely and exclusively on Relators' information and complaint. Although the Tenth Circuit did not find Relators' arguments persuasive on these issues, Relators would be entitled in this Court to invoke these alternative grounds to defend jurisdiction under the FCA and to argue that the "original source" issue need not even be reached in this case. Accordingly, even if there were reason to review the question presented (and there is not), this case would not be an appropriate vehicle to resolve it.

CONCLUSION

The Petition should be denied.

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IN THE

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COMSTOCK RESOURCES, INC., *et al.*,
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v.

DON C. KENNARD AND HARROLD E. WRIGHT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF

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REPLY BRIEF

In making their plea for "original source" status, respondents Kennard and Wright embrace the very aspects of the Tenth Circuit decision that conflict with other circuits' interpretation of the "direct . . . knowledge" requirement of 31 U.S.C. § 3730(e)(4). Respondents go on for page after page reciting facts that are intended to show, in the words of the Tenth Circuit, the "character of the relator[s'] discovery and investigation" and their "independent investigation, deduction, and effort." Pet. App. 10a, 14a. But only in the Tenth Circuit would these considerations suffice to qualify respondents as an "original source." The colorful details set forth in the brief in opposition cannot obscure the fact that respondents have *no* direct personal knowledge of any aspect of the allegedly fraudulent conduct that they claim violates the False Claims Act ("FCA"), a fact which would have ended the case had it been decided in the Second, Eighth, Ninth, or D.C. Circuits, rather than the Tenth.

The Second, Eighth, Ninth, and D.C. Circuits have held that personal, firsthand knowledge of the fraud itself is necessary to qualify as an "original source." In these circuits, no amount or quality of investigative labor (of any "character") can substitute for personal, firsthand knowledge of the actual fraud that forms the basis of the alleged FCA violation. These circuits recognize that such "direct" knowledge is gained by having "s[een], heard, or touched" the allegedly fraudulent conduct, Black's Law Dictionary 413 (5th ed. 1979), generally by "individuals who are close observers or otherwise involved in the fraudulent activity," S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. Respondents concede that the Tenth Circuit has no such requirement, and the existence of a circuit conflict is thus clear.

1. Although respondents contend that the Tenth Circuit's opinion was "much more nuanced and careful than Comstock admits," Opp. 17, they do not disagree with Comstock about the content of the Tenth Circuit's "original source" test. As respondents themselves acknowledge, the Tenth Circuit held that they met the statute's "original source" requirement because "it was only through independent investigation, deduction and effort that Relators discovered the alleged fraud." *Compare* Pet. 14 *with* Opp. 17. As Comstock demonstrated in its petition, the Tenth Circuit adopted an amorphous totality-of-the-circumstances inquiry that examines the "character" of the "investigation, deduction, and effort," none of which has the least bit to do with whether a relator has personal or firsthand knowledge of the fraudulent conduct at issue. Indeed, the Tenth Circuit's approach collapses the distinction between the two quite separate requirements of the statutory "original source" test: "direct and independent knowledge." In the Tenth Circuit, a relator can qualify as an original source by demonstrating "*independent* investigation, deduction and effort," Pet. App. 14a (emphasis added), even if the relator lacks *direct* knowledge of the allegedly fraudulent conduct that forms the basis of the relator's FCA complaint.

The Tenth Circuit was perfectly clear on this critical point, emphasizing not once but three separate times that "[k]nowledge of the actual fraudulent conduct is not necessary"; that "[a] 'relator need not . . . have in his possession knowledge of the actual fraudulent conduct itself'"; and that relators need not possess knowledge of "the actual alleged fraudulent submissions to the Government," Pet. App. 9a-10a (quoting and citing prior Tenth Circuit decisions). The Tenth Circuit has thus severed the original source inquiry from any requirement of direct personal knowledge of the actual fraudulent conduct that allegedly

violates the FCA. As demonstrated in the petition for certiorari, and as will be further elaborated *infra*, that is the precise way in which the Tenth Circuit conflicts with the decisions of the other courts of appeals.[1]

2. Respondents' effort to explain away this circuit conflict fails. As respondents would have it, a circuit conflict over the meaning of the "original source" test is simply not possible because the test is "highly fact-specific" and "[i]n no two *qui tam* cases will either the amount, character or source of the information possessed by the relator be the same." Opp. 19. But respondents do not contest that the Second, Eighth, Ninth, and D.C. Circuits apply a legal test that differs from the one the Tenth Circuit has adopted. These circuits interpret the "direct" knowledge standard in § 3730(e)(4) to require personal, firsthand knowledge of the fraudulent conduct that forms the basis of the FCA violation alleged in the relator's complaint. *See, e.g.*, *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("A relator is said to have direct knowledge of fraud when he 'saw [it] with his own eyes'") (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992)) (alteration in original); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("In order to be 'direct,' the information

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[1] Wright has argued elsewhere that, under the Tenth Circuit decision, "logical speculation" may qualify a relator as an original source. *See* Relator Wright's Surreply to Reply of Exxon Company USA and Exxon Corporation in Support of Defendants' Motion to Dismiss for Lack of Jurisdiction at 5, *United States ex rel. Wright v. Chevron, USA, Inc.*, No. 5:03-CV-264 (E.D. Tex. filed Aug. 5, 2004). "[L]ogical speculation" is a far cry from "firsthand knowledge."

must be first-hand knowledge."); *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 525 (9th Cir. 1999) (holding that "direct" knowledge requires a relator to "show that he had firsthand knowledge of the alleged fraud"). Respondents cannot point to a single case in which any of those circuits has permitted a case to proceed – as the Tenth Circuit did here – in the absence of such personal, firsthand knowledge. There is little question, therefore, that had this case been brought in the Second, Eighth, Ninth, and D.C. Circuits, the complaint would have been dismissed. *See generally* Pet. 11-12, 16-18.[2]

Instead, respondents seek to distinguish the cases from these circuits on their facts, but respondents' descriptions are rife with mischaracterization. For example, they assert that *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994), helps their cause. But the relator in that case had personal knowledge of the fraud – alleged overbilling by an arbitrator – because the relator had participated directly in the arbitration and knew that work billed had not been performed. The relator was actually a percipient witness to aspects of the fraudulent conduct alleged in the relator's FCA complaint and thus had personal knowledge of an aspect of the fraud, in direct contrast to relators here.[3]

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[2] Respondents also ignore the district court decisions cited in the petition that split in applying either a firsthand knowledge or "sufficient investigation" standard to relators' claims. *See* Pet. 21-22 (discussing cases).

[3] Respondents actually use ellipses to *edit out* the portion of the holding discussing personal knowledge. *Compare Springfield*, 14 F.3d at 657 (discussing relator's "personal knowledge of the arbitration proceedings") *with* Opp. 19 (editing out same quote). Despite respondents' effort to sow confusion, the D. C. Circuit has

Respondents' analysis of *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995), is similarly misleading. In that case, Priem (the relator) did indeed talk to witnesses, although there is no evidence that the witnesses were aware of the fraud in the submitted payroll reports. The core of the *qui tam* action was thus based on Priem's investigation at the worksite and his review of public documents. Even though Priem could be said to have "ferreted out" the alleged fraud, the Eighth Circuit held that Priem's knowledge was not "direct" because it was not firsthand, that is, Priem did not "s[ee it] with his own eyes." 44 F.3d at 703. The Eighth Circuit's holding in *Barth* is directly at odds with the Tenth Circuit's decision here.[4]

In all events, whatever factual distinctions there might be among these cases, the legal test these circuits employ conflicts directly with the test the Tenth Circuit adopted and

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left no doubt that a relator must possess firsthand knowledge of the alleged fraud. *See Findley*, 105 F.3d at 690; Pet. 18-19.

[4] In *Aflatooni*, the relator conducted a investigation into allegations of Medicare fraud aided by his experience in the medical field; he reviewed documents and interviewed witnesses about the information contained therein, and had personal knowledge of lax auditing procedures that could have facilitated the fraud. Yet the Ninth Circuit concluded that, these efforts aside, the relator's allegation of actual fraud was based on "speculation." 163 F.3d at 526. Respondents miss the forest for the trees by discussing two particular facts, but omitting the central holding: that "because the purpose of the FCA is to encourage individuals with true 'knowledge' of alleged wrongdoing to come forward and provide such information to the Government, the purposes of the Act would not be served by allowing a relator to maintain a *qui tam* suit based on pure speculation or conjecture." *Id.* In the Ninth Circuit, it is clear that the "character" and "effort" of investigation cannot save a complaint based on "speculation."

applied in this case – and that difference is outcome determinative because respondents lack direct personal knowledge of any aspect of the fraud alleged in their complaint.

3. Because the circuit conflict over the meaning of "direct" knowledge in § 3730(e)(4) is so clear, respondents expend most of their effort trying to establish that they have sufficient personal, firsthand knowledge to qualify as an original source under the test that prevails in most circuits. That effort is misconceived. Respondents do not assert that they have the kind of personal, firsthand knowledge that matters for purposes of § 3730(e)(4) – *i.e.*, knowledge of the actual fraudulent conduct that they allege in their FCA complaint. What respondents seek to demonstrate is that they have personal, firsthand knowledge of the specific facts alleged in their complaint, from which they have speculated that a fraud may have occurred. But none of those facts amounts to direct knowledge of any aspect of the fraudulent conduct respondents allege in their complaint. And the latter kind of knowledge is what qualifies as "direct" knowledge for purposes of § 3730(e)(4).[5]

Respondents' expanded narrative in the brief in opposition simply adds details of secondhand information and speculation: the unnamed General Counsel of the Texas

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[5] The "word 'information' refers to any essential element of the fraud transaction[.]" *Findley*, 105 F.3d at 690. Relators have no firsthand knowledge of any essential element of the alleged fraud. Merely asserting firsthand knowledge of some facts in the complaint, no matter how collateral, is plainly insufficient; the entire "direct and independent knowledge" requirement would be toothless if relators could meet it by asserting that they have direct knowledge of facts from which they speculate that a fraud has occurred.

General Land Office ("GLO") interpreting the meaning of the notation "EXPIRED," Bob Armstrong informing Kennard that the Mineral Management Service was "completely clueless," Pat Holloway (the counsel of record) "explain[ing]" to Kennard that royalty clauses in GLO leases differ from those in MMS leases. Opp. 10-11. None of those constitute firsthand knowledge of the alleged fraud.

Respondents also contend that Wright had direct knowledge because he allegedly noticed that his own royalty payments had dropped when Comstock began operating his wells. Even the Tenth Circuit recognized that inferring fraud by Comstock against the Tribe based on Wright's personal experience amounted to "speculat[ion]." Pet. App. 2a. Wright's leases covered wells that were not on the Reservation, and the leases were not federal leases at all. Wright had no knowledge of Comstock's practices with respect to the Indian Leases, no knowledge that Comstock was using "the same royalty pricing standards or methods" to calculate both his royalties and that of the Tribe, and no knowledge of any reduction in lease payments to the Tribes. Opp. 8. Information about Wright's own lease payments had nothing at all to do with Comstock's payments to the Tribe, and Wright's allegations of fraud were thus based on a series of inferences (about pricing methods, among many other things) without any factual basis. His "knowledge" of the fraud is entirely *indirect*, nothing more than guesswork.

Respondents' contention that they obtained "direct" knowledge by seeing the MMS-2014 forms, which reported the royalty payments to the Tribe, is a red herring. They did not discover the MMS-2014 forms by their own efforts; instead, as Holloway's affidavit states, they learned of the forms the Tribe gave to Holloway, who in turn showed them to Kennard and Wright. *See* Appendix to Brief of Appellants

Kennard and Wright at 187-88 (10th Cir. filed Mar. 24, 2003) (Holloway affidavit). The knowledge from those forms is thus *secondhand* and *indirect*, because respondents received the information through at least two intermediaries (Holloway and the Tribe). Information handed to a relator by a third party obviously cannot be used to satisfy the "direct" knowledge requirement, which is no doubt why the affidavits of Kennard and Wright submitted to support their status as relators makes no mention at all of any MMS-2014 forms. *See* Pet. App. 37a-68a. That is also no doubt why the Tenth Circuit's decision makes no mention of the MMS-2014 forms and holds that respondents' own investigation into the publicly available documents and Wright's own statements were sufficient to constitute "direct" knowledge. It is that aspect of the Tenth Circuit decision that is in conflict with other circuits and merits this Court's review.[6]

4. Respondents also spend substantial space justifying the Tenth Circuit's conclusion that they deserve relator status because they "ferreted out" the alleged fraud. This argument ignores the critical fact that the alleged fraud had already been publicly disclosed at the time the suit was filed, and, indeed, that the "original source" inquiry is never even reached unless the alleged fraud has been publicly disclosed

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[6] Respondents' discussion of the "expired" stamp on the state lease files suffers from the same deficiency. As both the opposition and the affidavits make clear, Kennard's allegations about the significance of the stamp came secondhand from the GLO General Counsel. *See* Opp. 9-10 (citing the detailed descriptions provided by the General Counsel); Pet. App. 41a-42a, ¶¶ 12-13 (same). Moreover, those documents were in the public domain, available to any researcher diligent enough to find them. Kennard's review of the public lease files thus did not constitute the sort of inside, personal knowledge that Congress required in the FCA.

by the time that relators file their suit. Congress accommodated the interest in ferreting out fraud by placing relatively few restrictions on a relator's ability to bring a *qui tam* action prior to public disclosure. An action at that time may rely on speculation, secondhand information, public documents, and independent investigation. Congress sensibly determined, however, that the balance changes once public disclosure occurs and the federal government can investigate the fraud by relying on the public disclosure. After all, the purpose of the FCA is to combat fraud on the federal government; the *qui tam* provisions rewarding relators are merely a means to that end. Once the alleged fraud has been publicly disclosed, the federal government has no need to share a potential award with relators lacking any firsthand knowledge, who, precisely because they lack personal knowledge, can add nothing as witnesses or insiders to bolster the government's case.

5. Respondents' final argument that there are alternative grounds to affirm the jurisdictional holding of the Tenth Circuit below is meritless. *See* Opp. 26-27. Respondents fully litigated, and lost, the question of whether their complaint was based upon a public disclosure. *See* Pet. App. 4a-8a. They have not filed a cross-petition from that adverse ruling and have not set forth any reason to believe that the Tenth Circuit decision affirming the district court on those issues was in any way erroneous. Indeed, any respondent could make vague and conclusory suggestions that other grounds justified the result below, and such allegations cannot suffice to justify a denial of review. Petitioners' alternative arguments were correctly rejected below, and are no bar to granting the petition to resolve the "direct . . . knowledge" conflict.

Accordingly, the petition should be granted.

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SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8, Petitioner Comstock Resources, Inc. respectfully files this supplemental brief to advise the Court of the Fifth Circuit's opinion in *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, No. 03-20376, __ F.3d __, 2004 WL 1959083 (5th Cir. Sept. 21, 2004) ("*Reagan*"), which was released after Comstock's reply brief had gone to the printer. That case deepens the conflict identified in the petition and demonstrates why resolution of the conflict is critical.

In *Reagan*, although the putative relator had gained some small amount of the information underlying the allegations of fraud from her own personal observation, the bulk of her knowledge was obtained by "'piecing together fragments of documentation' through FOIA requests, interviews, and review of documents in the state archives" and applying "her experience as a hospital administrator." *Reagan*, 2004 WL 1959083, at *6. Notwithstanding her intensive investigation, the Fifth Circuit concluded that she lacked the requisite "direct and independent knowledge" to qualify as an original source.

In particular, in direct conflict with the Tenth Circuit, the Fifth Circuit held that relator's knowledge was not "direct" because "the knowledge that she brings to the case is almost entirely indirect – that is, based on research and review of public records, not, with minor exceptions, her own observation." *Reagan*, 2004 WL 1959083, at *7; *cf.* Pet. at 23 (noting that circuits other than the Tenth Circuit require direct knowledge to come from "direct observation of or participation in the alleged fraud"). The Fifth Circuit thus correctly realized (as the Tenth Circuit did not) that knowledge based on research and review of public records rather than personal observation of the allegedly fraudulent

conduct is not "direct . . . knowledge" under 31 U.S.C. § 3730(e)(4).

To be sure, the Fifth Circuit addressed the role that a detailed investigation might play. But it did so only in the context of relator's argument that the investigation was relevant to supplement "the limited information to which she was privy," *Reagan*, 2004 WL 1959083, at *7, that is, to supplement the personal observation that triggered the subsequent investigation and that is the *sine qua non* of direct knowledge. For the Fifth Circuit, as in many other circuits outside the Tenth Circuit, detailed investigation can supplement, but cannot substitute for, personal firsthand knowledge.[1] Because the relator lacked any meaningful firsthand knowledge of the fraud alleged in her complaint, she could not meet the "direct . . . knowledge" requirement for "original source" status based on her investigation and effort. Application of the Fifth Circuit's analysis to the

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[1] That is the import of the Fifth Circuit's citation to *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). There, the relator first had "personal knowledge of the arbitration proceedings," 14 F.3d at 657, that he subsequently supplemented with extensive investigation. The D.C. Circuit held that the combination of prior personal knowledge and subsequent investigation was sufficient to constitute "direct" knowledge. *Id.*; *see also* Pet. 18-19; Reply 4 & n.3 As Comstock suggested in its petition, *see* Pet. 21 n.5, the Eleventh Circuit's decision in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), is to the same effect. There, the putative relator initially had firsthand knowledge gained by observing the fraudulent handling of his own benefit claims, and then supplemented that knowledge through an investigation. *See* 19 F.3d at 564, 567, 568 (evidence of wrongdoing obtained initially though processing of his own claims).

relators in the instant case would certainly have resulted in dismissal of their complaint against Comstock. The Tenth Circuit's decision is thus in conflict with the Fifth Circuit's decision in *Reagan*.

The Fifth Circuit's decision also underscores the pressing need for resolution of the conflict identified in Comstock's petition. The meaning of the "direct . . . knowledge" requirement is an issue of broad significance to all companies that do business with or pay funds to or receive funds from the federal government (and thus are potential targets for *qui tam* actions). *Reagan* confirms that, absent guidance from this Court, the issue will continue to divide and confuse the lower courts.

As this case indicates, that division has real-world consequences. This action was filed initially in the Eastern District of Texas and was transferred to the District of Wyoming for pretrial proceedings as a result of the MDL process. *See* Pet. 8-9, 27-28. Thus, absent similar *qui tam* actions against other defendants in other circuits – over which Comstock had no control – this case would have proceeded in the Fifth Circuit and (as *Reagan* demonstrates) relators' case would have been dismissed. Liability should not depend on such fortuity.

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No. 04-165

IN THE

Supreme Court of the United States

COMSTOCK RESOURCES, INC., *et al.*,

Petitioners,

v.

DON C. KENNARD and HARROLD E. WRIGHT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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Pursuant to Rule 15.8, Respondents Don C. Kennard and Harrold E. Wright respectfully file this supplemental brief to advise the Court of last week's decision of the Fifth Circuit in *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System,* No. 03-20376, __ F.3d __, 2004 WL 1959083 (5th Cir. September 21, 2004), dealing with the "original source" issue under the FCA.

The Fifth Circuit held that a former executive director of a hospital did not qualify as an "original source" where her knowledge was derived almost entirely from publicly disclosed information. For example, her knowledge of noncompliance was "based entirely on public records of testimony." 2004 WL 1959083 *6. She simply added a legal conclusion to the investigative work of others. *See id.* at *8. ("Reagan took disclosures that had already been investigated and reported by BCBS and HCFA and, based on her own experience, claimed that they were fraudulent; this disagreement with the legal conclusions of BCBS and HCFA does not qualify as 'information' under the original source exception.")

The Fifth Circuit's decision does not establish a circuit conflict. First, Wright did not examine or rely on any public records. Pet. App. 12a. Second, the Tenth Circuit agreed that "[a] mere compilation of documents or reports in the public domain will not allow a relator to qualify as an original source." Pet. App. 10a. Third, in the case at bar, "none of the public documents disclosed the alleged fraud." *Id.* at 13a-14a. "Relator's claim did not derive from a third party's research and investigation." *Id.* at 13a. Rather, Relators discovered the fraud and had first-hand knowledge of the information alleged in their FCA complaint — and of the same information alleged in the public disclosure by their

own renegade attorney Sydow who filed his competing non-FCA case for the Tribe, based solely and exclusively on the information supplied by Relators, one day before Relators filed this FCA case.

Relators' knowledge included first-hand knowledge of the actual fraudulent conduct by virtue of their personal review of the false MMS-2014 Reports.

Tellingly, the Fifth Circuit rejected Petitioners' interpretation of Section 3730(e)(4). The Fifth Circuit opined that "[u]nder this standard the relator is not required to 'have "direct and independent" knowledge of each false claim alleged in his complaint.' Instead the relator is simply required to possess direct and independent knowledge of the 'information on which the public allegations are based.'" 2004 WL 1959083, *6. Compare Petr. Reply at 6 and n.5. In the case at bar, Relators' knowledge of the information in the public disclosure happens to be exactly equal to their knowledge of the information in their own FCA complaint, because the public disclosure by their miscreant attorney Sydow was based solely and exclusively on the information Relators had furnished to him in confidence as their attorney.

As to the amount and nature of the information required, the Fifth Circuit adopted the same analytical approach as the Tenth Circuit:

> we are required to "look to the factual subtleties of the case before [us] and attempt to strike a balance between those individuals who, with no details regarding its whereabouts, simply stumble upon a seemingly lucrative nugget and those

> actually involved in the process of unearthing important information about a false or fraudulent claim."

2004 WL 1959083, *6 (citation omitted).

Indeed, the Fifth Circuit indicated that even second-hand information may be converted into "direct and independent knowledge" if "the investigation or experience of the relator either must translate into some additional compelling fact, or must demonstrate a new and undisclosed relationship between disclosed facts, that puts a government agency 'on the trail' of fraud, where that fraud might otherwise go unnoticed." 2004 WL 1959083, *7.

The Fifth Circuit's decision thus offers no support to petitioners' argument and in fact strongly supports Relators.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF OF THE UNITED STATES

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO BRIEF OF THE UNITED STATES

As *amicus curiae*, the United States embraces the Tenth Circuit's position that no direct personal knowledge of any aspect of an alleged fraud is necessary to allow a *qui tam* relator to qualify as an "original source." But the government is not a neutral observer. Its position reflects the Justice Department's interest in maximizing government recoveries by encouraging relators to pursue *qui tam* actions. In the False Claims Act, however, Congress sought a balance between the desire to maximize recovery and the need to protect contractors from parasitic and wasteful litigation. The present case is one in which the government's interest in maximizing recovery is at its nadir. The case involves an alleged fraud that *had already been publicly disclosed* in a civil complaint filed in federal court. The government is aware of the allegations of fraud and can act accordingly. The relators are not participants in or witnesses to the fraud, and thus they cannot add anything to the government's efforts to protect its interests. No other circuit has allowed a *qui tam* suit to proceed in the wake of public disclosure when the relator lacked any direct, personal knowledge of the alleged fraud. Thus, despite the belabored efforts of the United States to explain it away, there is a clear circuit split on the question presented in the petition.

That is unsurprising, because the statutory text forecloses the Tenth Circuit's approach: knowledge acquired by reading even "relatively obscure" public documents is not "direct." The United States offers no reason why a relator who relies on secondhand information should be permitted to proceed when the allegations of fraud have already been disclosed publicly, as the allegations were here. The principal points in the petition thus remain unrefuted.

1. The United States cannot dispute the fundamental point that relators Wright and Kennard had no personal firsthand knowledge of any aspect of the fraud they alleged. The relators were not participants in the alleged fraud, were not close observers of it, and relied on no non-public documents that disclosed any aspect of it. As even the Tenth Circuit acknowledged, but the United States does not address, Wright and Kennard did little more than speculate about possible theories of fraud. Pet. App. 2a.

The United States focuses on two facts in arguing that the relators had "direct" knowledge – Kennard's review of the public lease files stamped "expired" and Wright's review of his own royalty statements. Neither should suffice as direct knowledge under the statute.

Wright's review of his own royalty records – which involved non-Indian and indeed non-federal leases – provides no direct knowledge of any aspect of the fraud alleged in the complaint. Although Wright may have had personal knowledge of his own royalty payments, that does not constitute evidence that Comstock allegedly defrauded someone else (*i.e.*, the Tribe) on the basis of entirely different royalty payments under entirely different contracts – payments about which Wright knew nothing.[1]

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[1] That Wright may have had personal knowledge of evidence that led him to suspect fraud is insufficient. *Cf.* U.S. Br. 12-13. Section 3730(e)(4)(B) requires direct knowledge of relevant "information," and "information" has been interpreted as "refer[ring] to any essential element of the fraud transaction[.]" *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) (internal quotation marks omitted). Were relators considered to have "direct" knowledge merely because they possess personal knowledge of some evidence cited in their own complaint, however collateral that evidence might be to the fraud alleged in the complaint, the "direct and independent knowledge" requirement would be met in every case.

Similarly, Kennard's surmise that fraud may have occurred is based on public records and third-party interviews, and thus cannot qualify as direct, personal knowledge. Kennard relied on information from other sources, including Spencer Reid, the General Counsel of the Texas General Land Office, who interpreted the meaning of the notation "expired" stamped on some of the lease file jackets, and Bob Armstrong, a former MMS official, who provided his opinion that the MMS was "completely clueless." Opp. Br. 10-11; Reply Br. 7; Pet. App. 40a-45a (¶¶ 9-20). This type of reliance on secondhand information from other identifiable individuals is exactly the kind of conduct that other circuits have found insufficient – as the United States acknowledges. U.S. Br. 14-15.

It is thus incorrect to suggest that the court of appeals "essentially agreed with petitioners that 'direct knowledge' must be firsthand knowledge." U.S. Br. 9. Petitioners contend that the FCA requires personal knowledge of some aspect of an alleged fraud, and neither the United States nor the Tenth Circuit has identified any such personal knowledge on the part of Wright and Kennard.

Indeed, the United States' discussion of the Tenth Circuit's decision makes that clear. The United States emphasizes the "character" of the relators' investigation, their examination of public documents that were "relatively obscure," their "diligence," their "pre-existing industry expertise," and the fact that "none of the documents disclosed the alleged fraud." U.S. Br. 10. None of that constitutes

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To be sure, a relator need not have firsthand knowledge of *every* element of an alleged fraud, including the submission of a false claim to the government. As the United States acknowledges, U.S. Br. 12, Comstock does not advance that argument.

personal knowledge. Thus, the question whether a relator can be an original source without possessing any personal knowledge of any aspect of an alleged fraud is squarely presented.

2. The United States next attacks petitioners' standard – that a relator must have personal knowledge of some aspect of an alleged fraud – as "substantially flawed." U.S. Br. 11. That discussion, better suited to a merits brief, is beside the point at this stage. The central issue is petitioners' contention that the courts of appeals are in conflict.

In all events, the United States is unpersuasive on this point. The United States suggests, for example, that the standard is unhelpful because "a relator's firsthand examination of relevant documentary materials will often be a sufficient means of acquiring the requisite 'direct' knowledge," U.S. Br. 12, and that "[i]n other cases, a relator's scrutiny of documents (either public or private) may shed light on the relator's observation of the defendant's primary conduct." *Id.* at 12-13. In the latter case, however, the relator would have exactly the personal knowledge – the "observation of the defendant's primary conduct" – that the statute requires. And in the former case, it is precisely petitioners' contention, supported by other circuits, that review of public documents is necessarily indirect and does not provide the personal knowledge that the statute requires. Whether or not the observation of private documents by a participant in (or close observer of) the fraud provides "direct" knowledge says nothing about whether knowledge gained by observation of *public* documents by a *non-participant* is similarly "direct."

The United States also contends that petitioners' test "provides no formula for determining *how much* of the relevant information the relator must perceive directly," and

suggests that "[n]o single bright-line test will be adequate to resolve all cases in light of the widely varying fraudulent schemes that may give rise to *qui tam* actions." U.S. Br. 13. That argument is doubly misguided. First, the question is not whether petitioners' test eliminates all uncertainty, but whether the statute compels that test. The Tenth Circuit's approach permits a relator to qualify as an original source even when the relator lacks personal, firsthand knowledge of any aspect of the fraud alleged in the *qui tam* complaint – a result the statute does not permit. Second, petitioners do not suggest that their bright-line rule will resolve *all qui tam* cases, only that it resolves a good many cases, including this one.[2] That a bright-line rule will not resolve all cases is no justification for abandoning it in favor of *ad hoc* decisionmaking.

3. The United States' effort to explain away the split in the circuits is similarly unavailing. The United States cannot point to a single case in another circuit that was allowed to proceed when the fraud had already been disclosed publicly and the relator had no personal knowledge of any aspect of the alleged fraud. Indeed, no such case exists.

Faced with this reality, the United States contends first that because the original source inquiry looks to the "totality of the circumstances," the divergence among the circuits is better understood as "inconsistent conclusions in applying law to fact in close cases." U.S. Br. 14. But it is precisely the Tenth Circuit's adoption of an unconstrained "totality of the circumstances" approach – and the other circuits' rejection of such an approach – that creates the conflict.

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[2] The United States oddly suggests that petitioner's standard is "largely unhelpful in deciding this case." U.S. Br. 13. To the contrary, it is dispositive, as neither Wright nor Kennard had any personal knowledge of the alleged fraud.

Similarly unhelpful is the United States' effort to identify one "fundamental and consistent principle," namely that knowledge obtained from a third party is not direct. U.S. Br. 14. Even if correct, this observation is irrelevant. Whether knowledge obtained from a third party is indirect says nothing about whether knowledge obtained without the aid of third parties must be personal to be considered direct. Moreover, the Tenth Circuit diverged from even that principle. Kennard derived his knowledge from third parties.

Finally, the United States' effort to explain away the cases cited in the petition ignores the holdings of those cases and focuses instead on tangential facts. The reality is that the case brought by Wright and Kennard could not proceed under the law of other circuits. And the "inconsistent conclusions" acknowledged by the United States result from different understandings of the governing law. *See also* 1 John T. Boese, *Civil False Claims and Qui Tam Actions*, § 4.02[D], at 4-89 (2004-2 Supp.) (noting that the issue of "direct" knowledge "has become (along with 'public disclosure') the most litigated – and confused – issue under the *qui tam* provisions").

In the Eighth Circuit, for example, *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1995), controls. In that case, Priem obtained copies of payroll reports submitted by the defendant and, combining this evidence with interviews of employees, "formed a suspicion" the defendant employer mischaracterized its employees on government reports. *Id.* at 702. Priem had observed the actual false payroll reports and had particular knowledge of the work being performed, but because it was not firsthand – "he was a recipient of information and not a direct source," *id.* at 704 (quotation omitted) – he did not qualify as an original source. Yet Wright's and Kennard's "knowledge" was more attenuated that Priem's: rather than

reviewing the allegedly fraudulent reports, they reviewed other documents and speculated about what Comstock's royalty statements might reveal, and they gathered no evidence from any witnesses involved in the alleged fraud. This case would not have gone forward in the Eighth Circuit.

Similarly, in *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare Medical System*, 384 F.3d 168 (5th Cir. 2004), the Fifth Circuit held that a relator's knowledge was not "direct" notwithstanding an investigation in which the relator "'piec[ed] together fragments of documentation' through FOIA requests, interviews, and review of documents in the state archives" and applied "'her experience as a hospital administrator.'" *Id.* at 178. She thus relied on exactly what the United States points to as crucial here: diligence and expertise. *See* U.S. Br. 10. The Fifth Circuit held that this knowledge was "almost entirely indirect – that is, based on research and review of public records, not, with minor exceptions, her own observation." 384 F.3d at 178-79. Wright and Kennard obtained their "knowledge" of the alleged fraud through far less investigation and, like the *Reagan* relator, without any direct observation of the alleged fraud.[3] This case would not proceed in the Fifth Circuit, the circuit in which respondents initially filed their case. *See* Petrs' First Supp. Br. 3 (describing transfer of case under MDL procedures).

Further, the Tenth Circuit's holding is in direct conflict with *United States ex rel. Devlin v. California*, 84 F.3d 358

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[3] The United States mistakenly suggests that *Reagan* simply applied the principle that knowledge derived from a third party is not "direct." U.S. Br. 14-15. Although the relator's reliance on prior investigations formed the basis of the court's holding that relator's knowledge was not "independent," 384 F.3d at 178, that was not the basis for the court's conclusion that relator's knowledge was insufficiently "direct."

(9th Cir. 1996). Devlin was denied relator status because he lacked firsthand knowledge. As the court of appeals explained, "anyone could easily have done what Devlin did," and indeed "it is a virtual certainty that federal investigators would have done precisely the same thing once the information provided by [the insider] had been made public." *Id.* at 362. Thus, "the knowledge Devlin obtained did not make a genuine valuable contribution to the exposure of the alleged fraud." *Id.* As the court of appeals noted, "[i]t is 'the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity' that Congress sought to enlist through the *qui tam* provisions." *Id.* (citation omitted); *see also United States ex rel. Hansen v. Cargill, Inc.*, 107 F. Supp. 2d 1172, 1183 (N.D. Cal. 2000) (requiring relator to be a "percipient witness" to some aspect of the fraud). It is plain that Kennard and Wright could not survive the *Devlin* analysis. *See generally* Pet. 14-22 (describing split); Reply Br. 3-6 (same).

4. The government concludes its brief by suggesting that the absence of a clear standard "has not created significant practical difficulties in the government's enforcement of the FCA." U.S. Br. 18. But the point (which the United States does not confront) is that the absence of a clear rule has created enormous practical difficulties for private companies that do business with the government. *Cf. United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion) (rejecting government position that would undermine government's "own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies"). These companies are forced to defend actions brought by bounty-hunting interlopers, the vast majority of which turn out to be baseless.[4] *See* Pet. 13-14. Not only does the lack of

[4] That the United States is interested in encouraging *qui tam* suits rather than foreclosing unnecessary suits is corroborated by the government's

a clear standard enable relators to pursue claims based upon speculation, it also results in relators' pursuit of claims that are more a fishing expedition than a fraud prosecution.

Wright's own *qui tam* litigation illustrates the point. Based upon conclusions that even the Tenth Circuit described as "speculat[ion]," Wright is pursuing other FCA claims against most of the large gas producers who operate on federal or Indian lands.

The government's observation that it has the authority under 31 U.S.C. § 3730(c)(2) to seek the dismissal of meritless lawsuits is cold comfort. In practice, "[t]he government rarely moves to dismiss a qui tam claim." 1 Boese, § 4.06, at 4-142 to 142.1 (2004-2 Supp.). The government usually declines to intervene and allows the relator to proceed on the "outside chance" that a recovery may be had. *Id.* Defendants then face costly litigation and, in light of the FCA's treble damages and penalty provisions, *see* 31 U.S.C. § 3729(a), enormous pressure to settle.

In the end, the government fails to acknowledge the difference between the underlying policies of the FCA's "public disclosure" and "original source" requirements. The government notes that "[t]he purpose of the FCA's 'public disclosure' bar . . . is to identify those allegations of fraud on which the United States is already acting or readily capable of acting." U.S. Br. 18. But this petition involves the

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position that the relators' complaint was not "based upon" a prior "public disclosure." U.S. Br. 19 n.5. The United States' contention that no "public disclosure" occurs when allegations of fraud are disclosed in private civil lawsuits to which the federal government is not a party has not been adopted by *any* circuit, and its proposed construction of "based upon" is, as the United States acknowledges, the minority view. *Id.*

"original source" exception, not the "public disclosure" bar. The "original source" exception is designed to identify those individuals who should be rewarded for providing information about a fraud even when that fraud has already been publicly disclosed. Once allegations are publicly disclosed (as the allegations against Comstock were in the civil complaint filed by the Tribe), the government does not need a relator to pursue the claims. That is why Congress imposed the direct knowledge requirement, limiting potential relators to those "who are either close observers or otherwise involved in the fraudulent activity," and rewarding those individuals for breaking the "conspiracy of silence." S. Rep. No. 99-345, at 4-5 (1986), *reprinted in* 1986 U.S.C.C.A.N 5266, 5269-70. The government's arguments for a more capacious approach are ill-considered and highlight the need for this Court's guidance.

5. Finally, the interlocutory posture of this case is not a reason to deny review. The original source requirement is a threshold issue – indeed a jurisdictional issue – and this Court routinely reviews threshold issues even when a case has been remanded for further proceedings. The Court has done so in two recent FCA cases, *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), as it has in numerous cases in this Term, *see, e.g.*, *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005); *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005); *NCTA v. Brand X Internet Servs.*, 125 S. Ct. 654 (2004) (granting certiorari). The "direct" knowledge issue is squarely presented here and is ready for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

As the government's brief makes clear (at 14), this case involves the application of a "totality of the circumstances" standard to a somewhat unusual set of facts. The Tenth Circuit has subsequently applied the decision below in a case *denying* a relator status as an original source – a case Comstock ignores notwithstanding the Solicitor General's discussion (at 11 n.3). It is therefore clear that Comstock seeks to stitch together a circuit "conflict" based not on any meaningful difference in legal *standards*, but rather on the application of a contextually based test that leads to different *results*, depending on the circumstances. Given the strong interest of the government in the proper administration of the False Claims Act ("FCA"), its position in this case recommending a denial of certiorari is entitled to special respect.

1. Comstock leaves to the end of its supplemental brief its arguments responding to the government's apt observation that this case provides an unsuitable vehicle for this Court's consideration of petitioner's request that the Court further delineate the legal standard for determining an "original source." Yet those vehicle problems make this a particularly ill-suited case for this Court to delve into the jurisdictional issues surrounding original sources in FCA cases.

First, the interlocutory posture of the case counsels against further review at this time. Save for the unusual posture that the district court here erred in denying respondents status as original sources, which the Tenth Circuit properly reversed, in the ordinary course a lower court's judgment that respondents are original sources would not be subject to direct appeal. SG Br. 9. Absent the extraordinary showing needed for an interlocutory appeal, a defendant such as Comstock would have to wait until after the case has been decided to appeal that issue (as it would any other issue decided in an interlocutory phase of the case).

Second, and more importantly, Comstock asserts erroneously that the "alleged fraud . . . *had already been publicly disclosed* in a civil complaint filed in federal court." Pet. Supp. Br. 1. Nowhere does Comstock acknowledge that this case presents the highly unusual fact that the proper relators here – respondents Kennard and Wright – had their information stolen from them and that it was submitted in the civil complaint that Comstock contends was the public disclosure. *See* SG Br. 4-5. Comstock thus asks this Court to sanction the most egregious form of "gotcha" under the FCA: relators who themselves are defrauded by a wrongdoer's filing of *their* complaint allegations are denied status as original sources because their very own information was a "public disclosure." For this Court even to decide whether a relator in that position meets the legal standard for an "original source," it must first rule against respondents and hold that the filing of

the stolen complaint constituted a "public disclosure." As the Solicitor General points out, the government has taken the position generally that civil complaints to which the United States is not a party should not be considered "public disclosures." SG Br. 19 n.5. Before it could reach the question Comstock posits, therefore, this Court would have to address whether the fraudulently filed complaint was a public disclosure.[1] Comstock has asserted no conflict on that question.

Third, for this Court to rule against respondents, it also would have to determine that the information underlying their complaint was "based upon" the complaint filed the day before they filed theirs. As a matter of common sense, the allegations in respondents' complaint were not "based upon" the prior-filed complaint. Rather, that complaint stole *their* complaint allegations. As the government notes (at 19 n.5), for this Court to grant Comstock's petition, it necessarily would have to wade into a doctrinal thicket that has arisen over the meaning of "based upon." That is because respondents would be entitled to argue that their complaint was not "based upon" the complaint stolen from them by their renegade attorney. Yet Comstock's petition has not raised any issue concerning the construction of "based upon" in this case.

2. As the government notes, the Tenth Circuit did not announce a legal rule that departs from the test uniformly applied by the other circuits. After the decision below, the Tenth Circuit handed down *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004), *petition for cert. pending*, No. 04-1363 (filed Apr. 4, 2005). That

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[1] The antecedent nature of the public disclosure question derives directly from the text of the FCA, which provides that a court shall not have jurisdiction "over an action under this section based upon the public disclosure of allegations . . . unless . . . the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). If there is no "public disclosure" of the allegations, the court would have no reason to determine whether the "person bringing the action is an original source."

case "confirms the fact-specific character of the court's ruling in the instant case." SG Br. 11 n.3. Importantly, the Tenth Circuit in *Grynberg* made clear that it had not formulated any new legal test for determining whether a source was an "original source." Rather, the court simply applied a heavily fact-dependent contextual approach in ruling that Wright and Kennard are original sources in the decision below, and that Grynberg was *not* an original source in his case. *See* 389 F.3d at 1053-54. Comstock completely ignores *Grynberg* in its supplemental brief. But that case demonstrates that the rule applied by the Tenth Circuit simply reflects a settled "totality of the circumstances" legal standard applied to the facts presented by respondents Wright and Kennard. If the facts warrant a finding of direct knowledge to be original sources, as in respondents' case, the Tenth Circuit will so find; if the facts do not warrant such a finding, as in *Grynberg*, the Tenth Circuit will reject a relator's claim to be an original source. Those differences in result, however, no more create an intra-circuit split than they do an inter-circuit conflict.

What Comstock never comes to grips with is that its narrow vision of what constitutes "direct" knowledge – *i.e.*, that a relator "observed the fraud . . . with his own eyes" (Pet. 26) – is untethered to the text or to common sense. The FCA does not say *what* direct knowledge a relator must possess. As the cases demonstrate, a relator's direct knowledge that leads to the discovery of fraud can come in a variety of forms. The government rightly construes the statute in observing that the FCA "provides no formula for determining *how much* of the relevant information the relator must perceived 'directly' in order to qualify as an 'original source.'" SG Br. 13.

3. In response to the government's brief, Comstock's continuing effort to assert a circuit conflict has clearly run out of steam. Comstock abandons most of the cases it alleges to be in conflict and focuses on just three: *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699

(8th Cir. 1995); *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, 384 F.3d 168 (5th Cir. 2004); and *United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir. 1996). But, as the government notes, those cases do not create a conflict with the Tenth Circuit – indeed, after *Grynberg*, the absence of a circuit conflict is even clearer.

In *Barth*, the Eighth Circuit rejected a relator's contention of being an "original source" on the ground that the relator lacked direct knowledge of the alleged fraud. 44 F.3d at 703. Comstock mischaracterizes *Barth*. The putative relator there, Priem, was denied status as an "original source" because his role for the union caused him to gather information from others who themselves had "direct knowledge of alleged fraud." *Id.* The Eighth Circuit merely held – consistent with the legal standard applied by the Tenth Circuit below and in *Grynberg* – that the knowledge an original source has of the fraud must be direct; merely reporting information gathered from other persons with direct knowledge is insufficient. Here, no one reported to Kennard and Wright the fraud – they ferreted it out themselves. Thus, *Barth* is readily distinguishable. There is no basis for thinking that a conflict exists between it and the decision below.

The Ninth Circuit's decision in *Devlin* is to the same effect. The putative relator obtained the information of alleged fraud secondhand from another person who did have "firsthand knowledge." 84 F.3d at 361. In saying that respondents Wright and Kennard "could not survive the *Devlin* analysis," Pet. Supp. Br. 8, Comstock simply distorts the firsthand analysis and information that stemmed directly from respondents' efforts. Again, *Devlin* did not present a legal standard any different from the one applied by the Tenth Circuit; its facts merely differed from those adduced below.

Finally, Comstock's effort (at 7) to establish a conflict with *Reagan* has no merit. In language on all fours with the legal standard applied by the Tenth Circuit below and

in *Grynberg*, the Fifth Circuit in *Reagan* said that "[t]he plain meaning of the term 'direct' requires 'knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others.'" 384 F.3d at 177 (quoting *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 355 (5th Cir. 2003)). The court then applied that standard to hold that a relator who obtained her knowledge virtually entirely from public records was not an original source. *Id.* at 178-79. In *Reagan*, that consisted of information that "the public already knew." *Id.* at 179. Here, as the government acknowledges, respondents "did not rely on reports of others about alleged fraud." SG Br. 15. Rather, the information from their investigation "was the product of their own investigation from a variety of sources." *Id.*

In short, although Comstock seeks to take the government to task for not pointing to a single case from another circuit that supports the decision below, Pet. Supp. Br. 5, the government is completely correct to note the absence of any circuit conflict on the articulation of a governing legal standard for defining an "original source." What makes the result different here is that the facts support the Tenth Circuit's conclusion that respondents are original sources because they have direct knowledge of Comstock's fraud. Comstock simply refuses to acknowledge that the facts here are materially different from those in which other courts of appeals – all applying a commonly followed contextual standard – have rejected a particular relator's status as an "original source."

4. Finally, the policy arguments advanced by Comstock have no merit. First, Comstock argues that "the absence of a clear rule has created enormous practical difficulties for private companies that do business with the government." Pet. Supp. Br. 8. The assumption behind Comstock's statement is extremely attenuated – at best. Companies do not decide whether to deal honestly with the government or to commit fraud based on whether

the whistleblowers who may uncover their fraudulent schemes will be deemed "original sources." Under Comstock's strained view, a more stringent test for original sources – one based on "knowledge . . . obtained by direct observation of or participation in the alleged fraud" (Pet. 23) – would clearly hinder the government's recoveries for fraud. It would weed out those, like respondents, who carefully piece together information using their personal and direct knowledge and ferret out fraud that costs the United States government, as trustee for the Alabama-Coushatta Indian Tribe, millions of dollars in unpaid royalties. Because, as the government notes (at 12-13), such a result is contrary to the purposes and aims of the FCA, Comstock's policy argument is unpersuasive.

Second, Comstock contends that the government has an incentive to encourage *qui tam* suits and therefore seeks a broad standard for determining an "original source." Pet. Supp. Br. 1. That is incorrect. The government has an incentive to apply an interpretation true to Congress's intent. The government does not benefit from the presence in its FCA suits of relators that do not add original and direct information that advances the government's investigation. Such relators add no value and simply impede efficient litigation by the government. Moreover, the existence of relators in FCA suits denies the government a substantial share of any recovery it receives from wrongdoers. *See* 31 U.S.C. § 3730(d) (if government takes over action brought by *qui tam* relator, that relator shall receive between 15 and 25 percent of the proceeds). If a putative relator does not meet the statutory standard, the government may keep the entire recovery from an FCA defendant for itself. Thus, the government has a clear financial incentive to permit relator status only to the extent authorized by Congress.

* * * * *

For the foregoing reasons and those stated in the brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 9, 2005

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No. 04-165

In the Supreme Court of the United States

COMSTOCK RESOURCES, INC., ET AL., PETITIONERS

v.

DON C. KENNARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the respondents in this case, whose allegations of False Claims Act violations were based partly on the personal royalty records of one respondent and partly on respondents' scrutiny of publicly-available records in a state land office, had the requisite "direct and independent knowledge of the information on which the allegations [were] based" to qualify as "original source[s]" under 31 U.S.C. 3730(e)(4)(B).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Acting Solicitor General to express the views of the United States. In the view of the United States, this case does not merit further review at the current stage of the proceedings.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any person from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The FCA also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). Those provisions state, *inter alia*, that any person who "knowingly

makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government," is subject to liability under the Act. 31 U.S.C. 3729(a)(7). A person who violates the FCA "is liable to the United States Government for a civil penalty * * * plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory damages and penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C. 3730(b)(2) and (c)(3). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages and/or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA's "public disclosure" provision states:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on

> which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4); see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 944, 946 (1997).

2. Relators Don Kennard and Harrold E. Wright, the respondents in this Court, filed this *qui tam* action against petitioners Comstock Oil and Gas and related companies. Respondents' complaint alleged that petitioners had used false records to avoid paying the United States royalties due on natural gas removed from certain Indian lands, in violation of 31 U.S.C. 3729(a)(7). See Pet. App. 2a-3a.

In the district court, respondents submitted affidavits describing how they had acquired the information on which their suit was based. See Pet. App. 37a-48a (Kennard Affidavit), 62a-67a (Wright Affidavit). Respondent Kennard explained that in late 1997 he had reviewed a federal agency report on royalties paid for natural gas from federal and Indian leases. *Id.* at 37a-38a. Kennard observed that the report identified no payments for natural gas liquids, a valuable component of natural gas, for a particular area of Texas. *Id.* at 38a. Based on his knowledge of the natural gas industry, his discussions with respondent Wright, and his investigation of state records, Kennard determined that petitioners were operating the subject Indian leases in the relevant part of Texas. *Id.* at 38a-40a. Kennard also visited the state land office to examine petitioners' leases for the relevant Indian lands. *Id.* at 41a. He noted that the leases for the Indian lands were marked "expired," and he learned that petitioners had not contested that designation for their leases. *Id.* at 41a-42a.

Respondent Wright held royalty interests in property, including lands operated by petitioners, that was located near the Indian lands at issue in this case. Pet. App. 66a. After Kennard informed Wright of the information that Kennard had acquired concerning petitioners' operations in the relevant area of Texas, Wright compared the royalty payments and settlement sheets he had received from petitioners with royalty payments he had received from other companies in the same region. *Ibid.* Wright concluded that petitioners were underpaying royalties to him for gas, natural gas liquids, and condensate. *Ibid.* Based on that conclusion and on his industry experience, Wright inferred that petitioners might also be underpaying royalties for gas they removed from the nearby Indian lands. *Ibid.*

Respondents concluded that petitioners were operating under expired mineral leases for the relevant Indian lands and were therefore obligated to remit the full value of the gas, rather than simply a royalty percentage, to the federal agency charged with collecting royalties for the Indian Tribe. Pet. App. 44a-45a. Respondents further concluded that, even if the leases had not expired, petitioners were underpaying royalties on natural gas liquids from the Indian lands. *Ibid.*

3. On October 21, 1998, respondents informed the federal government of their intention to file suit under the FCA's *qui tam* provisions. Pet. App. 2a. Respondents' submission to the government included an unfiled copy of their *qui tam* complaint. *Ibid.* On October 26, 1998, one of the attorneys with whom respondents had consulted filed suit on behalf of the Indian Tribe that was the beneficiary of the amounts that allegedly had been underpaid to the Interior Department, raising essentially the same allegations that were contained in respondents' then-unfiled complaint. *Id.* at 2a, 20a-21a.

Respondents "allege that [the attorney] essentially stole their information in preparing the Tribe's complaint." *Id.* at 2a. Respondents filed their FCA complaint the following day. *Ibid.*

4. The United States declined to intervene to take over the litigation of respondents' FCA claims. Petitioners then moved to dismiss the suit. They argued, *inter alia*, that respondents' suit was "based upon" the same allegations that had been publicly disclosed in the Tribe's complaint, and that the suit was therefore barred by 31 U.S.C. 3730(e)(4)(A).[1]

The district court granted petitioners' motion to dismiss. Pet. App. 18a-33a. The court held that the "public disclosure" bar applied because the FCA complaint filed by respondents "contain[ed] allegations that were disclosed in a previously filed civil complaint." *Id.* at 26a; see *id.* at 24a-27a. The court also held that neither of the respondents was an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B). Pet. App. 27a-33a. The court explained that respondents "never had any intimate knowledge of the inner-working of" petitioners' operations and "merely provided [the district

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[1] In contending that respondents fail to qualify as "original source[s]" within the meaning of 31 U.S.C. 3730(e)(4)(B), petitioners rely heavily on the fact that respondents examined publicly available records in the state land office in formulating their allegations. Petitioners do not contend, however, that those state records were themselves the "public disclosure" that triggered the application of 31 U.S.C. 3730(e)(4)(A). By its terms, Section 3730(e)(4)(A) applies only to "the public disclosure of allegations or transactions *in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media.*" 31 U.S.C. 3730(e)(4)(A) (emphasis added). The relevant land office records, although publicly available, do not fall within any of those categories.

court] a compilation of information that is a matter of public record." *Id.* at 30a-31a.

5. The court of appeals reversed. Pet. App. 1a-17a.

a. The court of appeals agreed with the district court that respondents' allegations were "based upon" a "public disclosure" and were therefore covered by 31 U.S.C. 3730(e)(4)(A). Pet. App. 4a-8a. The court explained that the submission of the Tribe's complaint to a filing clerk in the clerk's office of the federal district court was a "public disclosure," *id.* at 5a-7a, and that respondents' complaint was "based upon the public disclosure" because "the complaints at issue are substantially similar," *id.* at 7a-8a.

b. The court of appeals held, however, that respondents fell within the "original source" exception (31 U.S.C. 3730(e)(4)(B)) to the FCA's public disclosure bar. Relying on its prior decision in *United States ex rel. Stone* v. *Rockwell International Corp.*, 282 F.3d 787 (10th Cir. 2002), the court held that "[k]nowledge of the actual fraudulent conduct is not necessary" for a relator to qualify as an "original source." Pet. App. 9a. In *Stone*, the Tenth Circuit had explained that the original source exception, by its plain terms, does not require that a relator have direct and independent knowledge of "the actual act of fraud, i.e. the actual submission of inaccurate claims," but rather requires such knowledge only of "the facts underlying or which gave rise to the fraud"—in that case, the environmental, health, and safety violations that rendered the submissions false. 282 F.3d at 802. The court of appeals in the instant case also found no support in the applicable precedents for petitioners' suggestion that a *qui tam* relator must be a "corporate insider" in order to qualify as an "original source." Pet. App. 10a.

The court of appeals held that respondents' consideration of public records in the course of developing their allegations did not prevent respondents from qualifying as "original source[s]." Pet. App. 10a-14a. While agreeing that "[a] mere compilation of documents or reports already in the public domain will not allow a relator to qualify as an original source," the court of appeals noted that a complete investigation of possible fraud against the United States will generally require review of some public documents. *Id.* at 10a. The court therefore examined the "character of [respondents'] discovery and investigation" to determine whether respondents' knowledge of the information upon which their allegations were based was "direct" within the meaning of 31 U.S.C. 3730(e)(4)(B). Pet. App. 10a.

The court of appeals observed that respondent Wright "did not refer to, examine, or rely on any public records," but instead "relied exclusively on his own personal, private royalty records and statements from [petitioner] Comstock and other oil companies." Pet. App. 12a. The court acknowledged that respondent Kennard had examined public records, *ibid.*, but noted that Kennard "did not merely compile statistics; he did his own research and investigation," *id.* at 13a. The court of appeals summarized respondents' contributions as follows:

> [Respondents] sorted through relatively obscure public documents, and together with personal royalty records, used these documents to discover and support their claim of the alleged fraud. It is important to note that none of the public documents disclosed the alleged fraud. It was only through independent investigation, deduction, and effort that [respondents] discovered the alleged fraud. [Re-

> spondents] had direct and independent knowledge of the fraud allegedly committed since they are the people responsible for ferreting it out in the first place.

Id. at 13a-14a (brackets and internal quotation marks omitted).[2]

DISCUSSION

The court of appeals' interlocutory ruling in this case is correct and does not conflict with any decision of this Court or of another court of appeals. Although the line between "direct" and "indirect" knowledge of information giving rise to a *qui tam* suit is not always a bright one, petitioners overstate matters in contending (Pet. 21) that the lower courts' application of the "original source" provision has been marked by "widespread confusion." Neither that larger body of precedent, nor the court of appeals' decision in the instant case, is adverse to the interests of the United States. The petition for a writ of certiorari should be denied.

A. In Light Of The Current Interlocutory Posture Of This Case, The Court Should Not Grant Certiorari

As an initial matter, the current interlocutory posture of this case counsels against a grant of certiorari. Based on its interpretation of the "original source" provision, the court of appeals reversed the district court's dismissal of respondents' suit and remanded the case

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[2] The court of appeals also held that respondents' allegations stated a claim for relief under 31 U.S.C. 3729(a)(7), even assuming that the financial harm occasioned by any underpayment of royalties that may have occurred in this case would ultimately fall upon an Indian Tribe rather than upon the federal fisc. See Pet. App. 14a-17a. Petitioners do not challenge that holding in this Court.

for further proceedings. No court has yet addressed the question whether petitioners have committed any violation of the FCA. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari and explaining that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 257-258 (1916). There is nothing about the "original source" rule that counsels against adherence to this Court's usual practice. A district court decision to the same effect as the ruling of the Tenth Circuit here would not be appealable as of right.

B. There Is No Clear Conflict In Authority

1. The Tenth Circuit's construction of the term "original source" is substantially similar to the approaches taken by other courts of appeals. Contrary to petitioners' contention (Pet. 14), the Tenth Circuit did not hold that "direct knowledge under the original source provisions of the FCA need not be personal, firsthand knowledge." Nor did the court "squarely adopt a 'sweat of the brow test'" (Pet. 21) under which a relator can qualify as an "original source" simply through diligent research into wholly public information.

The court of appeals essentially agreed with petitioners that "direct" knowledge must be firsthand knowledge. See Pet. App. 9a ("Direct and independent knowledge is knowledge marked by the absence of an intervening agency and unmediated by anything but the relator's own labor.") (brackets, ellipses, and cita-

tion omitted). The court also recognized that "[a] mere compilation of documents or reports already in the public domain will not allow a relator to qualify as an original source." *Id.* at 10a. The court was unwilling, however, to adopt "a bright-line rule disqualifying a relator as an original source when the relator examines public records." *Ibid.*

Rather, the Tenth Circuit evaluated the "character of the [respondents'] discovery and investigation" (Pet. App. 10a) to determine whether respondents possessed the requisite "direct and independent knowledge" of the information on which their allegations were based. The court of appeals noted that respondent Wright "did not refer to, examine, or rely on any public records," but "relied exclusively on his own personal, private royalty records and statements from Comstock and other oil companies." *Id.* at 12a. While acknowledging that respondent Kennard did "examine public records in the course of his independent investigation," the court stressed that Kennard "did not rely on a Government report dealing with the allegations and transactions on which the current *qui tam* action is based because no such document exists"; that respondent did not exploit "a third party's research and investigation" but instead "sorted through relatively obscure public documents"; and that "none of the public documents disclosed the alleged fraud." *Id.* at 12a-14a. In this way, Kennard's diligence and pre-existing industry expertise allowed him to infer possible fraud from raw materials, including private materials available from Wright, whose significance was not otherwise apparent. The court thus found that respondents had the requisite firsthand knowledge of the information on which their claims were based, both because their suit was based in part on nonpublic information (Wright's own

royalty records under his leases with petitioners) and because their allegations were not derivative of any third party's investigation or observation of identifiable fraud.[3]

2. Petitioners assert (Pet. 26) that "[i]nterpreting 'direct' to mean 'firsthand' provides a clear standard to apply in making the original source determination: either the relator observed the fraud (or some part of the fraud) with his own eyes, or he did not." That assertion is substantially flawed.

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[3] The Tenth Circuit's recent decision in *United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F.3d 1038 (2004), petition for cert. pending, No. 04-1363 (filed Apr. 4, 2005), confirms the fact-specific character of the court's ruling in the instant case. The court in *Grynberg* gave the following explanation for its prior determination in this case that respondents Wright and Kennard qualified as "original source[s]":

> In concluding [respondents] qualified as an original source, even though part of their investigation included information in the public domain, we focused on two significant factors. First, [respondent] Wright did not refer to, examine, or rely on any public records. Instead, he relied exclusively on his own personal, private royalty records and statements from Comstock and other oil companies in forming his suspicions regarding Comstock's royalty payments. Second, while [respondent] Kennard did examine public records in the course of his independent investigation, he did more than compile statistics. Most importantly to Grynberg's case, Kennard did not rely on a Government report dealing with the allegations and transactions on which the current *qui tam* action is based because no such documents existed. *No public documents disclosed the alleged fraud.* As a result, we held that [respondents] ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

Id. at 1053-1054 (brackets, citations, and internal quotation marks omitted).

Contrary to petitioners' contention, substituting the word "firsthand" for the statutory term "direct" does not eliminate potential uncertainties in the application of the "original source" definition to particular circumstances, or even provide a straightforward basis for resolving the instant case. The conduct specifically prohibited by 31 U.S.C. 3729(a)(1) is the knowing "present[ation]" to the United States government of a "false or fraudulent claim for payment or approval." Similarly under 31 U.S.C. 3729(a)(7), the prohibited conduct is the "mak[ing]" or "us[e]" of a "false record or statement" to evade a financial obligation to the government. The court of appeals recognized (Pet. App. 9a-10a), however, and petitioners appear to accept, that a relator need not actually witness the defendant's *submission* of a claim (or of a false record or statement) to the government in order to qualify as an "original source."[4]

Because violations of the FCA are frequently committed through the use of false or misleading documents, and because the investigation and litigation of FCA cases often focus on examination of written records, a relator's firsthand examination of relevant documentary materials will often be a sufficient means of acquiring the requisite "direct" knowledge of the information on which his suit is based. In other cases, a relator's scrutiny of documents (either public or private) may shed light on the relator's observation of the

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[4] Section 3730(e)(4)(B) requires that, to be an "original source," a relator must have "direct and independent knowledge of the *information* on which the *allegations* are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). It does not require that the relator have direct and independent knowledge of the fraud itself. The text of Section 3730(e)(4)(B) therefore does not require that an "original source" must personally observe the fraud, in whole or in part, as it is occurring.

defendant's primary conduct (*e.g.*, by revealing a discrepancy between the defendant's actual practices and its representations to the government). Petitioners' insistence that an "original source" must have "firsthand knowledge" does not resolve the issue of *what* the relator must know firsthand.

In another respect as well, application of the "original source" provision does not lend itself to pure bright-line rules. The statutory definition of the term "original source" requires "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). It is not unusual, however, for a relator's knowledge of different categories of information to be acquired through different means. The text of the "original source" provision provides no formula for determining *how much* of the relevant information the relator must perceive "directly" in order to qualify as an "original source." Respondents, for example, unquestionably had firsthand knowledge of Wright's own royalty statements, which were integral to identifying the alleged fraud. Petitioners' contention that the term "direct" should be construed to mean "firsthand" is therefore largely unhelpful in deciding this case.

A sensible application of the "original source" requirement in Section 3730(e)(4)(B) must take into account the foregoing considerations. No single bright-line test will be adequate to resolve all cases in light of the widely varying fraudulent schemes that may give rise to *qui tam* actions.

3. a. Largely for the reasons stated in Part B.2, *supra*, the prevailing standards for determining whether a particular relator qualifies as an "original source" may be imprecise at the margins, and it therefore is possible that different appellate panels might occasionally reach

inconsistent conclusions in applying law to fact in close cases. Contrary to petitioners' contention, however, the approaches used by other courts of appeals to resolve "original source" issues are not materially different from the approach employed by the Tenth Circuit here. The courts of appeals all effectively define "direct" knowledge as knowledge that is firsthand, while looking to the totality of the circumstances to determine whether the necessary firsthand knowledge exists.

The most fundamental and consistent principle to have emerged in the courts of appeals in the application of the "original source" provision is the established rule that knowledge derived from an identifiable third party is not "direct" knowledge within the meaning of Section 3730(e)(4)(B). See, *e.g.*, *United States ex rel. Kreindler & Kreindler* v. *United Tech. Corp.*, 985 F.2d 1148, 1159 (2d Cir.) (where attorney derived information from defendant through discovery in another case, knowledge was not direct), cert. denied, 508 U.S. 973 (1993); *United States* v. *New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (following holding in *Kreindler* that a relator lacks direct knowledge "if a third party is 'the source of the core information' upon which the *qui tam* complaint is based"); *United States ex rel. Kinney* v. *Stoltz*, 327 F.3d 671, 672-673 (8th Cir. 2003) (relator who acquired relevant information from depositions of defendants' employees lacked direct knowledge), cert. denied, 540 U.S. 1105 (2004); *United States ex rel. Devlin* v. *California*, 84 F.3d 358, 361 (9th Cir.) (relators lacked direct knowledge of information obtained from an employee who had participated in the fraudulent scheme), cert. denied, 519 U.S. 949 (1996); see also *United States ex rel. Reagan* v. *East Texas Med. Ctr. Regional Healthcare Sys.*, 384 F.3d 168, 177 (5th Cir. 2004) ("The

plain meaning of the term 'direct' requires 'knowledge derived from the source without interruption or gained by relator's own efforts rather than learned secondhand through the efforts of others.'") (citation omitted). The Tenth Circuit's decision here is consistent with that rule, since the court of appeals relied in part on the fact that respondents' claims "did not derive from a third party's research and investigation." Pet. App. 13a.

The central focus on whether the information on which the allegations are based was obtained from another person is supported by the text of the False Claims Act in several respects. First, Congress evidently referred in Section 3730(e)(4)(B) to an "individual" who is an "*original* source" primarily in contradistinction to one who is a *secondary* source or *derivative* source—*i.e.*, a person who derived the information from another *individual*. Second, the statute requires "direct" (as opposed to indirect) knowledge, which, as dictionary definitions make clear, involves the absence of intervening third parties. See *Webster's Third New International Dictionary* 640 (1993) ([2]direct def. 4: "marked by absence of an intervening agency, instrumentality, or influence: immediate"); *ibid.* ([3]direct def. b: "from the source or the original without interruption or diversion"; def. d: "without any intervening agency or step"). Here, respondents did not rely on reports of others about alleged fraud. The information on which the allegations were based was the product of their own investigation from a variety of sources, including publicly available but relatively obscure public documents, cf. *United States Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-764 (1989).

b. Petitioners' claim of a circuit conflict (see Pet. 16-18) is unfounded. For the most part, the cases on which petitioners rely involved relators who were found to lack the requisite "direct" knowledge because they had obtained their information from identifiable third parties. Thus, in *Kinney*, the Eighth Circuit held that a relator was not an "original source" when he learned of the relevant information in depositions of two employees in prior litigation. See 327 F.3d at 673, 674-675. As just noted, the Tenth Circuit in this case agreed with the uniform rule in other circuits that relators whose claims depend on such information do not qualify as "original source[s]." And in an earlier case, *United States ex rel. Barth* v. *Ridgedale Electric, Inc.*, 44 F.3d 699 (1995), the Eighth Circuit stated that "a person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source under the [FCA]," *id.* at 703, and it relied in part on the fact that one relator (Priem) had obtained relevant information through "his interviews with [the defendant's] employees," *id.* at 704; see *id.* at 702. Accord *Hays* v. *Hoffman*, 325 F.3d 982, 990-991 (8th Cir.), cert. denied, 540 U.S. 877 (2003).

The Ninth Circuit decisions on which petitioners rely are also readily distinguishable. In *United States ex rel. Aflatooni* v. *Kitsap Physicians Services*, 163 F.3d 516 (9th Cir. 1999), the relator claimed to have "learned of [the defendant's] alleged fraudulent activities *by speaking with patients who had previously received medical services from [the defendant]*, and by reviewing their medical records," *id.* at 525 (emphasis added), and yet even then could not recall the name of a single Medicare patient who had allegedly been charged for unnecessary procedures, see *id.* at 526. In *Devlin*, the

Ninth Circuit held that "the relators' knowledge was not direct and independent because they did not discover firsthand the information underlying their allegations of fraud * * *, but derived it secondhand from [an employee of the defendant], who had firsthand knowledge of the alleged fraud as a result of his employment." 84 F.3d at 361. In *United States* v. *Alcan Electrical & Engineering, Inc.*, 197 F.3d 1014, 1021 (9th Cir. 1999), the court relied in part on the district court's finding that "most everyone in [the local union] knew of the work recovery program" through which the alleged fraud was perpetrated—a finding that has no analog here—and the relator did not identify any other specific basis on which he learned of the alleged fraud.

The Second and D.C. Circuit decisions on which petitioners rely (see Pet. 18) are likewise unhelpful to their position. The relators in the Second Circuit cases acquired their information from identifiable third parties. See *New York Med. Coll.*, 252 F.3d at 121 (relators lacked "direct and independent knowledge" of the relevant information when "the source of the core information underlying plaintiffs' allegations of fraud is the two audits conducted by" a state public benefit corporation) (internal quotation marks omitted); *Kreindler & Kreindler*, 985 F.2d at 1158-1159 (relator did not qualify as "original source" when he obtained his information from the defendant and its employees through discovery in a different lawsuit). In *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), cert. denied, 522 U.S. 865 (1997), the relator acquired his information concerning the defendant's allegedly fraudulent practices when he attended a conference with federal procurement officials, and those practices had already been publicly disclosed before the relator even became aware of them. See *id.* at 678, 691. And in

United States ex rel. Springfield Terminal Railway v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994), the relator was held to satisfy the "original source" criteria when it "started with innocuous public information * * * [and] completed the equation with information independent of any preexisting public disclosure." *Id.* at 657.

C. There Is No Pressing Need For Clarification Of The Legal Standard Used To Identify An "Original Source"

The absence of any bright-line test for identifying "original source[s]" has not created significant practical difficulties in the government's enforcement of the FCA, and the court of appeals' decision in the instant case is unlikely to have any such deleterious effect. The Tenth Circuit's analysis reflects a pragmatic effort to distinguish between those relators who provide meaningful assistance in putting the government on the trail of fraud, and those who simply exploit pre-existing knowledge of possible wrongdoing. That approach is consistent with both the text and purposes of 31 U.S.C. 3730(e)(4).

Petitioners suggest (Pet. 29) that a narrow reading of the "original source" provision is an appropriate means of facilitating dismissal of meritless *qui tam* actions. Certainly the interests of the United States are not served when legally or factually deficient suits are brought against those who do business with the government. The purpose of the FCA's "public disclosure" bar, however, is to identify those allegations of fraud on which the United States is already acting or readily capable of acting, not to identify allegations that are lacking in merit. Defendants in *qui tam* cases may invoke the usual mechanisms to achieve dismissal of meritless suits, cf. p. 9, *supra* (noting that no court has

yet ruled on the merits of respondents' allegations here), and the FCA separately affords the United States the unilateral authority to dismiss a *qui tam* suit over a relator's objection if the government deems that course to be in the public interest. See 31 U.S.C. 3730(c)(2)(A); *Swift v. United States*, 318 F.3d 250, 252-254 (D.C. Cir.), cert. denied, 539 U.S. 944 (2003).[5]

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[5] Respondents have noted the possibility that the judgment below might be affirmed on the alternative grounds that (a) the filing of the Tribe's complaint on October 26, 1998, did not constitute a "public disclosure" within the meaning of 31 U.S.C. 3730(e)(4)(A), and (b) respondents' *qui tam* suit was not "based upon" the allegations in the Tribe's October 2, 1998, complaint because respondents did not derive their knowledge from the Tribe's filing. See Br. in Opp. 26-27. Those issues present legitimate questions concerning the proper construction of the FCA's "public disclosure" bar. The United States has previously argued in the lower courts that a disclosure in a private civil action to which the federal government is not a party does not constitute a "public disclosure" for purposes of Section 3730(e)(4)(A). The court of appeals' interpretation of the phrase "based upon" in Section 3730(e)(4)(A) implicates an existing circuit conflict (though the court's understanding of that phrase accords with the great weight of appellate authority). Compare, *e.g.*, Pet. App. 7a-8a (respondents' *qui tam* complaint was "based upon" a prior "public disclosure" because respondents' allegations were "substantially similar" to the allegations in the Tribe's complaint); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) (Section 3730(e)(4)(A) applies when the relator's allegations "are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit * * *, regardless of where the relator obtained his information."); *United States ex rel. Mistick PBT* v. *Housing Auth. of Pittsburgh*, 186 F.3d 376, 385-389 (3d Cir. 1999) (same), cert. denied, 529 U.S. 1018 (2000); *United States ex rel. Biddle* v. *Board of Trs. of Leland Stanford, Jr. Univ.*, 147 F.3d 821, 825-828 (9th Cir. 1998) (same), cert. denied, 526 U.S. 1066 (1999); *Findley*, 105 F.3d at 682-685 (same) with, *e.g.*, *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1347-1349 (4th Cir.) (*qui tam* com-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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plaint is "based upon" a "public disclosure" only if the relator actually derives his claims from that public disclosure), cert. denied, 513 U.S. 928 (1994); *United States ex rel. Feingold* v. *AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003) (same).

The existence of those potential alternative grounds for affirmance at this interlocutory stage may provide a further reason for denying the petition, particularly because the various provisions of Section 3730(e)(4) are sufficiently interrelated that it is difficult properly to construe any one of them in isolation from the others.